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THE

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FOR

# ENGLAND AND WALES.

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# 1926.

THE

# LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING

## Probate Division.

## COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

## COURT OF APPEAL;

ALSO DECISIONS IN THE

## ECCLESIASTICAL COURTS.

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# JUDGES

OF THE

# PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF

# THE HIGH COURT OF JUSTICE.

1926.

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Sir MAURICE HILL.
Sir A. D. BATESON.

# JUDGES

OF

# THE COURT OF APPEAL.

1926.

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VISCOUNT CAVE, Lord Chancellor.

LORD HEWART, Lord Chief Justice of England.

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# CASES

DETERMINED BY THE

# PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

# ECCLESIASTICAL COURTS.

---

## DIVORCE.

1925
*July* 27, 31
*Oct.* 22.

## REID *v.* REID.

*Divorce—Practice—Permanent Maintenance—Existing Allowance under Deed of Separation—Injunction to restrain Proceedings to enforce Separation Allowance.*

A wife who has an allowance under a separation deed which contains no provision for its termination in the event of a divorce, and has obtained a divorce, may on applying for an order for permanent maintenance be restrained by the order from taking any proceedings to enforce the allowance under the separation deed in addition to such allowance.

In this case the husband and wife had executed a deed of separation in 1922, and had lived apart under its provisions until December, 1924, the husband paying the wife 25*s.* a week for maintenance. On September 17, 1924, the wife obtained a decree absolute against her husband on the ground of his adultery.

On October 7, 1924, the wife filed a petition for permanent

1925

REID v. REID.

maintenance, and on July 15, 1925, an order was made by the registrar for payment by the husband of 25*s.* per week for the maintenance of his wife during their joint lives.

The husband had taken no steps to vary the deed of separation as a post-nuptial settlement, and the deed itself contained no provision for its avoidance in case of a divorce.

The husband appealed from the registrar's order to the judge in chambers. The appeal was adjourned into Court by Lord Merrivale P. and argued before him on July 27 and 31, 1925.

*Acton Pile* for the husband.

*H. W. Barnard* for the wife.

The main argument for the husband was that the 25*s.* a week in addition to sums to which the wife was entitled under a settlement and some small sums which she would have an opportunity to earn, would give her more than one-third of the joint income of husband and wife. There was no application to vary the separation deed, but counsel for the wife had offered to submit to any order the Court would make.

*Cur. adv. vult.*

Oct. 22. THE PRESIDENT (LORD MERRIVALE) delivered the following judgment. This was an appeal arising out of a dispute between the husband, who had been divorced by his wife, and the wife in respect of the maintenance the husband might properly be required under the statutes and practice of the Court to provide for the wife. The circumstances were a little out of the ordinary course, and the appeal raised one or two questions of some general consequence. The main question at issue was the amount of the maintenance to be provided. Another question arose upon a separation deed which had been executed by the parties during the marriage and under which they had separated; and there was a good deal of discussion between counsel at the Bar as to the position of the parties with regard to the separation deed, and as to what ought to be done in respect of it. The

husband had obtained leave to apply under the relevant section of the Divorce Act of 1857 (20 & 21 Vict. c. 85) to set aside the deed. The Court has power in proceedings for divorce to vary or to annul settlements, and that power was appealed to on the part of the husband. That was a strong measure, because he was the guilty party in the transaction; and I think the records of the Court will be searched in vain for any instance where the Court at the instance of a guilty party has varied or annulled the settlement in his favour.

The main question raised by the husband's notice of appeal was the amount of the maintenance. Counsel put it in this form: that the order of the registrar, which was an order for payment by the husband to the wife of 25*s.* per week, was an order which the registrar could not make having regard to the practice of the Court; that it increased the wife's income to an amount which would bring that income to a sum exceeding one-third of the joint income of the husband and wife. The practice of the Court no doubt is that where provision for permanent maintenance is being made it will be in the ordinary run of cases not more than a third of the joint income of the parties. That ground of appeal raised a question as to what the wife's true income was. [His Lordship then examined the figures relating to the wife's and husband's incomes and showed that the 25*s.* a week allowed by the registrar when added to her own income would give the wife slightly more than one-third of the joint incomes of the husband and wife; and if the 25*s.* a week payable under the separation deed were also added she would have considerably more than the one-third, and continued:] If, therefore, the husband is right as to the grounds of appeal, he would be entitled to have the order varied.

Now the appeal, so far as amount goes, proceeds upon the footing that there is a hard and fast rule. If one thing is clearer than another in the decisions upon this frequently contested matter, it is that each case is dealt with upon its circumstances, and that the practice of providing for a wife the amount of a third of the joint income does not proceed upon a rule of law. It is found to be a just and convenient

1925

REID v. REID.

The President.

practice. I take that to be well settled. But each case must be dealt with on its merits. What is the substance of the matter? The wife has a secured income of 70*l*. She may, if she gets the loan of the furniture in question and gets a house convenient for subletting at a profit, add some shillings to that income. The husband has an income of 200*l*. The husband was the wrongdoer. While the marriage was subsisting he agreed, upon the separation, to provide to the wife during her life not less than 25*s*. a week; and she had then the same settled moneys she has now; and he believed, and I think she believed, she could contribute a great deal to her own maintenance by appearing as a stage artiste. Taking that view of the matter, what has happened is that the learned registrar has had regard to what the husband agreed to three years ago when these parties were separated by agreement; and he has said, "Now you must pay that 25*s*. a week." I think that is complained of as the vice of the order. It is quite clear that the order for alimony pendente lite was founded upon that view: that the husband had agreed to pay that amount, and that it was proper that he should pay it. I think the permanent order proceeds on the same footing. The registrar treated the agreement as a decisive factor; and, having regard to the substance of the matter, that the amount is not ascertained or ascertainable by any mathematical process, that the husband was the wrongdoer, and that three years ago he agreed when he himself was in the same position as he is now, and the wife had at any rate as good prospects as she has now, that the amount should be 25*s*. a week, it seems to me, looking at it in that light, to be impossible for me to overrule the judgment at which the learned registrar has arrived, and the appeal fails.

I must say a word further with regard to the separation deed. It was not the view of the registrar that there could be any proceedings under the separation deed; and the respondent upon this appeal and her counsel submitted to such order as the Court might make about the separation deed. It is necessary that the separation deed should be

dealt with, because it is alive and effective, and could be sued upon. It may be that there is some process in equity by which it could be controlled. That has never been decided; but there is power in this Court to control it, and I propose to amplify the order made in the registry in this way: the maintenance to be provided will be the sum assessed by the registrar, 25*s.* a week, but the wife will be restrained, so long as this order is effective, from taking any proceedings under the separation deed.

1925

REID v. REID.

The President.

Solicitors for the husband: *Firth & Co.*
Solicitors for the wife: *George Brown, Son & Vardy.*

J. R. B.

---

ADMIRALTY.

1925
*Nov.* 4, 5.

## THE BORS.

*Shipping—Collision in the Thames—Vessel crossing the River—Duty to give Warning—Port of London River By-laws, art.* 34.

By art. 34 of the Port of London River By-laws, 1914, steam vessels crossing the river "shall do so at a proper time having regard to vessels navigating up and down the river, and shall be navigated so as not to cause obstruction, injury, or damage to any other vessel."

The plaintiffs' steamship *D.*, which had been at anchor head down on the north side of the river waiting to cross over to the south side to enter the Surrey Commercial Docks, was proceeding to work slowly across the river under port helm. In this position only her stern light was visible to the defendants' steamship *B.*, which was coming down the river to the south of mid channel. The *B.* sounded a short blast to a tug coming up the river and the *D.* sounded two short blasts and starboarded her helm a little. As the *D.* got more athwart the river she opened her green light to the *B.*, which thereupon reversed her engines and dropped both anchors, but her stem came in contact with the starboard quarter of the *D.*:—

*Held*, that although a crossing vessel had not the duty, as she had under the old Thames By-laws of 1898, of keeping out of the way of vessels navigating up and down the river, art. 34 did not give her the right of way, but specially put upon her the obligation of care both as to the time when she crossed and the way in which she crossed; that the *D.* ought to have given ample warning either by means of a long warning blast or preferably a short blast to indicate that she was crossing

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the bows of the *B.*, or have taken timely action to allow the *B.* to pass if there was not room to cross ahead of her; and that the *D.* was alone to blame.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the Danish steamship *P. N. Damm.* The defendants were the owners of the Norwegian steamship *Bors.* The collision occurred on the evening of December 31, 1924, in the Thames near the entrance to the Surrey Commercial Docks.

According to the statement of claim, the *P. N. Damm*, a screw steamship of 2281 tons gross, 305 feet long, laden with a cargo of wood for the Surrey Commercial Docks, had been at anchor head down on the north side of the river and was working over under port helm to the Surrey entrance, making about two knots. Her stem was about abreast of a dolphin near the upper pier head of the entrance, and she was angled three or four points to the southward. In these circumstances those on board her observed the masthead light and the red light of the *Bors* coming down river, distant about three to four cables and bearing about three to four points on the starboard quarter. The *P. N. Damm* continued to manœuvre with her engines working half speed ahead and stopping at intervals and her helm aport, gradually getting more athwart river. The *Bors* came on opening her green light and shutting out her red light, and was heard to sound one short blast. The whistle of the *P. N. Damm* was sounded two short blasts in reply and her helm was starboarded a little, but the *Bors* came on, and with her stem struck the starboard quarter of the *P. N. Damm* near the stern, doing her some damage, and forcing her starboard side into collision with the dolphin, doing further damage.

The plaintiffs alleged (inter alia) that the *Bors* failed to keep out of the way of the *P. N. Damm* and that she ought to have starboarded and gone under the *P. N. Damm's* stern.

According to the defence, the *Bors*, a screw steamship of 1208 tons gross, 238 feet in length, was on a down river course, keeping to the south of mid channel and making about four knots, when those on board her particularly

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noticed the white stern light of the *P. N. Damm* distant about a quarter of a mile and bearing about two points on the port bow. The *Bors*, having sounded a short blast to a tug and tow coming up the river, continued on, keeping to the south side of the channel. The *P. N. Damm*, however, after sounding two short blasts on her whistle, was observed to open her two masthead and green sidelights. The engines of the *Bors* were at once stopped, but as the *P. N. Damm* appeared to be coming across the river rapidly the engines were immediately put full speed astern, three short blasts sounded on the whistle, the helm was put hard-a-starboard and both anchors were let go, but the *P. N. Damm* with her starboard quarter struck the stem of the *Bors*.

The defendants alleged (inter alia) that the *P. N. Damm* attempted to cross the river at an improper time and that she sounded an improper and misleading signal.

*C. R. Dunlop K.C.* and *Balloch* for the plaintiffs.
*Langton K.C.* and *E. Aylmer Digby* for the defendants.

BATESON J. In this case I find the *P. N. Damm* alone to blame. The collision happened on the evening of December 31, 1924, near the entrance to the Surrey Commercial Docks. The *P. N. Damm* was waiting to enter the docks. She was lying about 1700 feet above the entrance and 150 or 200 feet out from the north shore, and at the collision she was angled about four points off the up and down river course. The tide was flood with the force of about one knot, and there was a strong westerly gale. The *P. N. Damm* lay at anchor while other vessels were going into the Surrey Docks, and when the way was clear she proceeded to get up anchor. This was at about 5 P.M., and the collision happened at 5.10 P.M. Having got up her anchor she had to take manœuvres which would throw her stern towards the north shore and her bow into the stream. In that position she had to wait until two tugs had passed, one to the north and the other to the southward. It was not until these tugs had got clear away that the

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*P. N. Damm* was able to make for the Surrey entrance. Evidence has been given that she went at a speed of about two knots. The speed cannot have been great, because the distance that had to be crossed was only about 520 feet of water. In these circumstances the *P. N. Damm* was crossing the river when the *Bors* was seen about three cables lengths away. I am satisfied that the two vessels saw each other at much the same time and distance. The red light of the *Bors* coming down the river showed her to be right over in her own proper water. The *P. N. Damm* did not wait and let the *Bors* go by, but continued with her manœuvres. Just before the collision those on board the *P. N. Damm* saw the green light of the *Bors*, showing that they had just crossed her bows. The collision happened very shortly afterwards.

The following signals were exchanged. One short blast was sounded by the *Bors*, and the *P. N. Damm*, for a reason which is not very apparent, replied with two short blasts. The *Bors* kept on going down on her proper side at no great speed—about four knots—with the white stern light of the *P. N. Damm* open on the port bow. The *Bors* did not realize that anything was wrong until the *P. N. Damm* opened her two masthead lights and her green light. Immediately on seeing those lights the *Bors* stopped and reversed her engines, sounded three short blasts, hard-a-starboarded her helm, and dropped both anchors. A collision, however, took place, the stem of the *Bors* striking the starboard quarter of the *P. N. Damm*, doing very little damage. The *P. N. Damm* then struck the dolphin near the upper pier head of the entrance, and this did further damage. It is important to bear in mind that the damage was slight, because it shows that the *Bors* had taken practically four knots way off by the time of the collision.

What is the result ? By art. 48 of the old Thames By-laws, " steam vessels . . . . crossing from one side of the river towards the other side " had to " keep out of the way of vessels navigating up and down the river." This rule, which made the crossing ship the give way vessel, was altered in 1914, and by the new rule, art. 34 of the Port of London

River By-laws, 1914, "every steam vessel crossing from one side of the river towards the other side shall do so at a proper time having regard to vessels navigating up and down the river, and shall be navigated so as not to cause obstruction, injury, or damage to any other vessel." This, I think, means that the obligation of care as to time of and navigation in crossing is specially put on the crossing vessel. It certainly does not allow the crossing vessel to behave as if she had the right of way. I think, therefore, that the action required of these two vessels was a give and take by each, with the obligation, however, on the crossing vessel, as she was executing the less ordinary manœuvre, to take care to give ample warning as to her movements if she meant to cross the bows of a vessel going up or down, or to take timely action to allow such vessel to pass up or down if there was not time and room to cross. If she cannot give ample warning it behoves her to be very careful. The *P. N. Damm* always presented a stern light to the down coming ship. That stern light, in the manœuvres taken, would be moving to the north for some time, and with a vessel in the position of the *P. N. Damm* it was essential that those on board should do everything possible to warn the down coming vessel in time or let her pass down. The *P. N. Damm* did nothing to warn the *Bors*, or to show what she was doing, or let her pass. There was no warning other than the two blast signal. That signal would have been most misleading if the pilot of the *Bors* had thought it had anything to do with him. If the signal was intended for the *Bors* it meant that the *P. N. Damm* was going to the northward out of her way. A long warning blast would have been better, or still better a short blast, which would have indicated that the *P. N. Damm* was coming across under port helm and that the *Bors* must look out for her crossing over. Possibly the pilot of the *P. N. Damm* thought he had the right of way, and was entitled to blow two blasts in answer to the one short blast of the *Bors* to show that he was not accepting the whistle signal of the *Bors*. However that may be—and I do not think it was

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what the pilot intended to convey, as, to invite a ship coming down the river in her own proper water to starboard to a white light on her port bow, would be very dangerous—the *P. N. Damm* could easily, by a slight delay in her manœuvres, have let the *Bors* pass down. It is said that the *Bors* ought to have seen the stern light coming slowly towards her. Even if I thought that the *Bors* could have seen that and had delayed a little before taking action I could not find her negligent in this case. I have consulted the Elder Brethren on the point, and we all think that the time and space available for the *P. N. Damm* to get across made it most difficult for the *Bors* to realize what the manœuvre was. I give judgment for the defendants.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*
Solicitors for the defendants: *Ince, Colt, Ince & Roscoe.*

E. C. M. T.

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*Nov.* 9, 16.

## DIVORCE.

## CAVENDISH *v.* CAVENDISH.

*Divorce—Practice—Discovery—Subpœna duces tecum—Discovery tending to show Adultery.*

In a wife's petition for divorce on the ground of adultery the petitioner served the respondent with a subpœna duces tecum requiring him to produce his pass book and cheques for a given period; his correspondence with two women with whom adultery was charged; and his diaries. The only issue in the action was that of adultery:—

*Held*, that the subpœna must be discharged on the ground that an order for discovery cannot be made against a party to divorce proceedings when it is sought for no other purpose than to prove that party guilty of adultery.

WIFE'S PETITION for divorce on the ground of her husband's adultery.

The petition was filed on July 13, 1925, charging adultery with A., and two days afterwards a supplementary petition was filed, charging adultery with B. On September 10, 1925, the husband filed answers to both petitions denying

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adultery. Both A. and B. intervened. No issue was raised in the action except that of the husband's adultery. On October 15, 1925, a subpœna ad testificandum and duces tecum in common form was served on the husband requiring him to produce at the hearing all his paid cheques during the years 1922–1925, with the counterfoils; his banker's pass book for the same period; and all his correspondence with A. or B. and another named woman; and his diaries during those years.

The husband now moved to set aside the subpœna as an abuse of the process of the Court.

*Acton Pile* for the motion. The only issue to be tried in this case is whether the husband has committed adultery. It is a well settled principle of our law that a man cannot be asked to prove his own guilt. The only purpose for which the documents can be required is to prove the husband's adultery; and *Redfern* v. *Redfern* (1) is a direct authority that discovery cannot be required from him for that purpose.

*T. Bucknill* for the petitioner. The jurisdiction of the Court to order production of documents is unlimited. There is no doubt that the documents will be admissible evidence so soon as the husband denies his adultery in the witness box, as he no doubt must do. And it is convenient to give him notice that the materials for cross-examination may be in Court. He referred to *Farulli* v. *Farulli* (2), and *Lee* v. *Angas*. (3)

*Cur. adv. vult.*

Nov. 16. THE PRESIDENT (LORD MERRIVALE). This was the motion of the respondent in a suit for divorce on the ground of adultery to set aside a subpœna ad testificandum and duces tecum which had been served upon him by or on behalf of the petitioner in the suit. [His Lordship stated the facts as above and proceeded:] Counsel for the respondent moved to set aside the subpœna on the grounds

(1) [1891] P. 139. (2) [1917] P. 28.
(3) (1866) L. R. 2 Eq. 59.

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that, inasmuch as the respondent is not a compellable witness, the subpœna ad testificandum to him was unwarranted, and that the subpœna duces tecum in its express terms was an abuse of the process of the Court. The application was founded upon the familiar principle that a party charged with adultery may not be called upon by compulsory process to provide evidence in support of the charge. Counsel cited the very familiar case, now of long standing, of *Redfern* v. *Redfern* (1), in which it was established in the Court of Appeal in the year 1891 that a party in a suit in this Division in which the issue is the issue of adultery may not be required to answer interrogatories and may not be required to make discovery. Counsel contended that the grounds of that decision of the Court of Appeal involved the conclusion that a party alleging adultery may not provisionally require the opposing party to produce documents in the event that that party should become voluntarily a witness in the cause. Counsel for the petitioner, on the other hand, contended that under the general practice of the High Court he was entitled, in anticipation of the possibility that the respondent, being a competent witness, would give evidence, to require by subpœna that the respondent should have available in the Court for the purposes of cross-examination, documents, if any, in the respondent's possession or control which would, by reason of the evidence of the respondent, become proper subject for cross-examination. It was not contended that there was any authority dealing directly with the matter, and learned counsel on both sides left it very much upon the footing of the general considerations of principle which govern the procedure of the Court.

I do not think the governing principle could be more perfectly expressed than it is in the judgment of Bowen L.J. in the case of *Redfern* v. *Redfern*. (2) It is a class of matter which necessarily must from time to time engage the attention of a judge sitting here and it has from time to time engaged my attention, but I regard the judgment of Bowen L.J. as

(1) [1891] P. 139. (2) [1891] P. 147.

probably as perfect a statement of principle as it is applied here as could be devised (1): "It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form; but adultery is a charge of such gravity as to render it not unnatural that we should find the doctrine still applicable to it—that 'no one is bound to criminate himself.' Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastical monitions that is now technical and obsolete, the privilege in such a case has never been abrogated. The principle has been recognised as governing similar subject-matter by common law and equity alike. . . . . The Ecclesiastical Courts have dealt with the question in a like manner." The Lord Justice then cited the decision of Dr. Lushington in the Ecclesiastical Court in *King* v. *King* (2), in which it was held, as one conceives it must inevitably have been held, that the rigorous compulsory process of the Ecclesiastical Courts was not available to enforce an answer to a libel which alleged adultery. Learned counsel on behalf of the petitioner did not question the scope of that decision, but he said it has never been decided that the Court may not require a party who gave evidence to produce documents which became material in the course of the evidence, and claimed that it was a reasonable thing that a litigant who was confronted with the possibility of opposing evidence on the part of his opponent should be in a position to make effectual cross-examination. On general grounds there is a good deal to be said for that view, but the question is whether there is a right to require that opposing party by subpœna to attend to and to produce documents relating to a charge of adultery. There can be no sort of question that at the time this subpœna was served and at the present time there is no ground upon which such a subpœna could be

(1) [1891] P. 147. (2) (1850) 2 Rob. 153.

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treated as effectual. The petitioner has no right to require the respondent to be here to give evidence at the petitioner's instance upon her charge of adultery against the respondent, and the petitioner has no right, in anticipation of the trial, to require the respondent to furnish himself with documents which might tend to support the petitioner's charge against him, and to have them here in case he goes into the box and becomes subject to cross-examination. So that obviously on the face of it the subpœna is bad, and that was apparent at the hearing of the motion, but counsel referred to the apparent convenience of requiring a party who might elect to give evidence to be in a position to be effectually cross-examined, and I thought it worth while to determine, upon consideration, whether the prima facie answer to the claim of right to serve a subpœna was an absolute answer. I have come to the conclusion that the prima facie answer must be an absolute answer. The principle is clearly that enunciated in the judgment of Bowen L.J. in *Redfern* v. *Redfern* (1), and it is easy to observe, in the progress of the law by means of which parties in legal proceedings have become competent to give evidence, the marked solicitude of the Courts in all the branches of judicature of this country lest the power to give evidence and to require the giving of evidence should infringe upon that great principle of the common law of the country that a party cannot be required by evidence to criminate herself or himself. The utmost care has been taken in that way. It was taken when the Evidence Act of 1851 (14 & 15 Vict. c. 99) was passed. It was taken when the Matrimonial Causes Act of 1857 was passed. It is remarkable that in the Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85)—the Act which established the jurisdiction exercised now in this Court—the Court directed that the procedure should be that of the Courts of common law, the superior Courts of law at Westminster, trial in open Court, and trial by jury, and, with regard to the power to require the presence of parties, directed that the petitioner might be required by the Court to attend at the hearing, and

(1) [1891] P. 139.

significantly omitted any direction that the accused party might be required to appear. That, of itself, is a very significant fact. When the latest of the Evidence Acts, upon which the matter now depends, was passed it was made clear that a respondent in divorce was not a compellable witness; so that the principle to which I have referred was maintained there. Since that time it has been common form in the High Court to issue subpœnas in suitable cases, and the general process of subpœna has been used in this Court, and parties are subpœnaed, whenever it is practicable, to produce documents at the hearing, very often no doubt by way of precaution; but no instance was cited to me in which the Court had sanctioned the issue of a subpœna to an accused party in a case involving adultery to be present to produce documents. The question did arise long ago in the experience of the Divorce Court in the case of *Hooke* v. *Hooke* (1) in 1858. Sir Cresswell Cresswell had before him the question whether under the divorce jurisdiction it was competent to require the attendance of an accused party for the purpose of confrontation with witnesses. In the Ecclesiastical Courts it is quite clear that the right of confrontation was a valid right in procedure in matrimonial causes, and that it was enforced by those stringent means by which the Ecclesiastical Courts enforced their decrees, and the submission of the petitioner in *Hooke* v. *Hooke* (1) that the respondent, who was charged with adultery, should attend for the purpose of confrontation with the petitioner's witnesses in accordance with the former practice of the Ecclesiastical Courts applied a touchstone to the suggested right of the petitioner in this case. Dr. Spinks, who was of counsel for the petitioner, said: "This is not a motion under the provisions of the Divorce Act, but to exercise a power which was vested in the Ecclesiastical Courts." It was the practice of those Courts in cases like this to make what was called a Decree of Confrontation ordering that the party should attend in order that he or she might be confronted

(1) (1858)] 28 L. J. (P. & M.) 29, 30.

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with the witnesses for the purpose of identification, and Sir Cresswell Cresswell said: "The practice of the Ecclesiastical Courts to decree confrontation does not apply to a suit for dissolution." By giving the Court, under s. 43 of the Matrimonial Causes Act, 1857, express power to order the petitioner to attend at the hearing the Legislature seems to have assumed that, without express power, the Court could not compel the attendance of the parties. It might have given a similar power to compel the attendance of the respondent, but it has not done so, and nobody who considers the matter can doubt that the Legislature had not infringed the common law rule with regard to the immunity of accused parties because its intention was not to infringe it. That conclusion of Sir Cresswell Cresswell so long ago as 1858 seems to me a most cogent conclusion with regard to this matter.

The rules of the common law were identical rules of force in the civil Courts and the criminal Courts, and it is interesting now, when procedure has been by progressive Acts moulded to meet a state of things in which a defendant party is competent and, in some cases, compellable to give evidence, to note what has happened in the criminal Courts where, just as here, the party is competent to give evidence upon any charge, but not compellable. And really it is illuminating to refer to Archbold's Criminal Practice and Procedure of the period forty years ago when the defendant in a criminal cause was neither competent nor compellable to give evidence, and Archbold's Criminal Practice now in use when the defendant in a criminal proceeding is competent, but not compellable. I had the curiosity to make the comparison. In 1886 the young practitioner, who furnished himself with Archbold in those days, found the law stated in this way: "With regard to subpœna duces tecum in criminal cases, if any person, not being the defendant, have in his possession a written instrument which may be requisite as evidence in the cause, then, instead of the common subpœna, you must serve him with a subpœna duces tecum commanding him to bring it with him and produce it at the

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trial." The vital words there are "not being the defendant." In 1898 the Criminal Evidence Act was passed, which made the defendant a competent witness. Referring to Archbold's Criminal Practice and Procedure now, the passage is re-written in a very interesting form. The statement as to requiring a person, not being a defendant, by subpœna to produce a document at the hearing is reproduced, but the learned editors add at the foot of the passage, which is reproduced from the older editions: "A subpœna duces tecum may not be served on a defendant in a criminal case. Notice to produce a document must be given instead."

I have examined the matter because it is essential to bear in mind the broad principles upon which the jurisdiction in divorce for adultery is exercised. It is, of course, most proper that the parties should be given every facility for arriving with certainty as far as may be at the truth where charges are the subject of conflicting evidence, but, as it seems to me, it is beyond doubt that this subpœna is an unwarrantable subpœna and must be set aside.

Solicitors: *Webster & Webster; C. R. A. Edmonds.*

J. R. B.

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*Nov.* 16, 27.

ADMIRALTY.

## THE LORD STRATHCONA (No. 2).

*Shipping—Practice—Security—Interveners—Security against Loss due to Fall in Shipping Values—Further Security after Judgment.*

In a mortgage action in rem the plaintiffs (mortgagees) in January, 1925, recovered judgment by default condemning the ship and ordering her sale by the marshal. Thereupon certain charterers, to whom the mortgagors had chartered the ship for a term of years, intervened, claiming (inter alia) a declaration that the charterparty was binding on the mortgagees; and by an order of March 3, 1925, the sale of the ship stood over pending the trial of the issue, upon the interveners giving security in an amount satisfactory to the registrar for loss arising from delay and any loss on sale due to a fall in shipping values. The registrar ordered certain sums to be given, and on July 15, 1925, Hill J. gave judgment that the plaintiffs were not bound by the charterparty, that they were entitled to the judgment they had obtained, and that the costs of and occasioned by the intervention should be paid by the interveners. On October 14 the ship was sold by the marshal, according to the plaintiffs, for 20,000*l.* less than she had been valued at nine months previously. The plaintiffs accordingly took out a summons for further security:—

*Held*, that, although judgment had been given against the interveners and they were not appealing against that decision, the matter was still at large, as they were contesting the plaintiffs' claims before the registrar; that accordingly the interveners could be ordered to give further security in respect of possible loss of capital and interest and for the marshal's expenses; and that the case must be referred to the registrar to find what amount should be given and what was the amount of the plaintiffs' damages under each head.

This summons (adjourned into Court for argument) raised the question whether, after judgment had been given against them, interveners could be ordered to give further security to the plaintiffs in the action in respect of the damages they had sustained in consequence of the unsuccessful intervention.

The plaintiffs, the Old Colony Trust Company, as mortgagees of the defendants' steamship *Lord Strathcona*, brought an action in rem claiming judgment for the amount of their mortgages and an order for the sale of the ship by the marshal. No appearance was entered by the defendant shipowners, and on January 26, 1925, judgment was given by default condemning the ship and ordering her sale. Thereupon, on

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February 11, the Dominion Coal Company entered an appearance as interveners, alleging (inter alia) that a charterparty entered into in 1914 between themselves as charterers and the company then owning the *Lord Strathcona*, for a succession of seasons with options of renewal which did not expire until 1932, was binding on the plaintiffs as mortgagees, and, therefore, that the ship could only be sold subject to the obligations of the charterparty. On March 3, 1925, accordingly, the sale of the ship was ordered to stand over pending the trial of the issue, upon the interveners giving security in an amount satisfactory to the registrar "for loss in respect of interest arising from delay and any loss on sale by reason of general fall in shipping values." On March 12 the registrar ordered the interveners to give security in the sum of 8000*l.* in respect of possible loss on sale, 800*l.* for interest, and 200*l.* for marshal's expenses. The interveners duly complied with this order.

On July 15 Hill J. gave judgment that the plaintiffs were not bound by the charterparty, and that accordingly they were entitled to the judgment they had obtained for the sale of the ship, and that the costs of and occasioned by the intervention should be paid by the interveners. (1) On July 30 his Lordship reversed an order of the registrar directing the interveners to give further security in the sum of 300*l.* for marshal's expenses and 150*l.* for interest on the mortgages. On October 14 the ship was sold by the marshal for 33,000*l.* Thereupon the plaintiffs took out the present summons and filed affidavits in which they alleged that there was due to them under the mortgages, according to the registrar's report, over 45,000*l.* plus interest, and that the value of the ship, if sold in the early part of 1925, would have been 53,000*l.* Accordingly they asked (inter alia) for an order confirming the report of the registrar assessing the amounts due to them by way of capital and interest; for payment out of the proceeds of sale after payment of the marshal's expenses; for an order that the interveners should pay the

(1) [1925] P. 143.

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plaintiffs a sum of money equivalent to the loss by way of capital and interest in consequence of the delay of the sale of the ship until October 14; and for an order that the interveners should give further security in respect of the loss of capital, interest, and marshal's expenses.

*Langton K.C.* and *Alfred Bucknill* for the plaintiffs. The President's order of March 3 was intended to secure that any expense or loss due to the postponement of the sale should be borne by the interveners. The plaintiffs are or may be short of security to an amount of nearly 10,000*l.*

[HILL J. Can I order further security after judgment?]

In *Brown* v. *Haig* (1) a further sum by way of security was ordered after judgment.

[HILL J. That was for further costs which would necessarily be incurred. Here judgment has been given and the ship has been sold.]

Without further security the President's order will be abortive; the Court has a general power to give due effect to the order at any time.

*Balloch* for the interveners. It is admitted that there must be an inquiry by the registrar as to whether the plaintiffs have suffered any loss by reason of an alleged general fall in shipping values; but assuming that to be answered in the affirmative the plaintiffs are limited to the amount of the security fixed by the registrar. The interveners have failed, they are not appealing, and there is no further liability on them.

*Langton* in reply. When the registrar fixed the security he had not got the best evidence of the fall in shipping values, for the ship had not been put up for sale at that time.

*Cur. adv. vult.*

Nov. 27. HILL J. read the following judgment. The plaintiffs, who have succeeded in this action, ask for directions. About some matters there is no dispute as between the

(1) [1905] 2 Ch. 379.

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plaintiffs and the interveners. As to these matters: (1.) I confirm the registrar's report. (2.) Apart from the plaintiffs' claims, there are no claims in the registry against the proceeds. The marshal, of course, is entitled to retain his own charges and expenses. To the balance the plaintiffs are entitled. The marshal tells me that 27,000*l.* may be at once released to the plaintiffs, and I order accordingly. The balance will remain pending the ascertainment of the marshal's costs and charges.

I now come to questions as between the plaintiffs and the interveners, who became defendants and counter-claimants. The interveners lost and the plaintiffs were given, as against the interveners, their costs of and occasioned by the intervention. (1) As the intervention was permitted after the plaintiffs had, in default of appearance of the owners, obtained judgment against the ship and had also obtained an order for appraisement and sale, "costs of and occasioned by the intervention" means all plaintiffs' costs subsequent to the intervention except such as the plaintiffs would have incurred if there had been no intervention. [His Lordship dealt with the marshal's expenses as part of the plaintiffs' costs and continued as follows:] I now come to the question of the damages sustained by the plaintiffs by reason of the postponement of the sale. This partly turns on the interpretation of an order made on March 3, 1925, but also upon a larger question. The plaintiffs contend that they are entitled to recover whatever damages they have suffered by the postponement of the sale. The interveners contend that the plaintiffs are only entitled to damages in respect of the heads of loss mentioned in the order and to the extent of the security which has been ordered in respect of those heads of loss. The position on March 3 was that the plaintiffs had obtained a judgment against the ship and an order for appraisement and sale, and the sale had been advertised by the marshal. The order postponed the sale until further order, and under it the interveners were permitted to deliver a defence and counterclaim and (*a*) to contend that the plaintiffs' mortgage was

(1) [1925] P. 143.

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invalid and generally to contest the plaintiffs' right to a judgment at all, and (*b*) to contend that the plaintiffs' rights ought to be exercised only subject to the interveners' charterparty. The order contained the following among other directions: "Upon the Dominion Coal Co., Ld., giving security in an amount and form satisfactory to the registrar for loss in respect of interest arising from delay and any loss on sale by reason of general fall in shipping values . . . . the hearing of the motion do stand over until further order. Liberty to apply and all questions of costs reserved." I am clearly of opinion that the contention that the liability is limited to the amount of security ordered is wrong. The promise to give security involves a promise to pay the debt which is to be secured. I have no doubt at all that the plaintiffs are entitled to the whole loss in respect of interest arising from the postponement of the sale and the whole loss on sale by reason of a general fall in shipping values. [His Lordship dealt with other possible heads of damage and continued as follows:] Whatever the damages are I think the interveners ought to pay them, and that under the liberty to apply contained in the order of March 3, I ought to make an order to that effect. I refer all questions of the amount of damages to the registrar. He will have no doubt some difficult matters to deal with. He will have to find the period of delay caused by the postponement, and in doing so he may have to consider whether the ship would have been sold on the day originally fixed (February 25, 1925) or only at some later date and also whether the ship ought, as the interveners contend, to have been sold at auction on August 11, 1925. These matters were mentioned in argument. But I am not seeking to fetter the registrar. He will determine the period of delay. Having done that he will then have to decide the damages suffered thereby, including the loss by reason of the fall in shipping values and the loss of interest. As to interest, I will only add, as it was mentioned during the argument, that the interest which the plaintiffs lost by the postponement of the sale was not necessarily interest at the mortgage rates. On

the other hand it was not necessarily interest at the rate which the Court is in the habit of allowing upon judgments. It is such a rate as the registrar finds to be fair having regard (inter alia) to the fact that the plaintiffs are bankers and would have had the proceeds in hand so many months earlier.

I will now deal with the paragraph in the plaintiffs' summons in which they ask for further security. The amount of the security is for the registrar. The question for me is whether any further security can or should be ordered. At the end of July, upon the materials then before me, I reversed an order which had been made for further security for loss of interest and marshal's expenses. I may have given good or bad reasons for so doing, but it was done upon the interveners' representation that judgment had gone against them and they were not going to appeal, and were therefore no longer interested in the case; and as they were foreigners it seemed idle to order security to be given by persons who had no interest to obey the order. Now, however, the interveners are taking a very active interest in the case, and attend by counsel to contest the present summons and show that they will vigorously dispute the plaintiffs' claims against them. I think the matter is now open. As they are still active parties, an order for further security for the plaintiffs' costs, including the marshal's expenses, can be made against them, and if they still wish to be active parties they must comply with the order of March 3, 1925, and give such security as the registrar directs on the two heads which are mentioned in that order and referred to his determination. (1) The plaintiffs will have the costs of this summons against the interveners.

Solicitors for the plaintiffs: *Ince, Colt, Ince & Roscoe.*

Solicitors for the interveners: *William A. Crump & Son.*

(1) On December 3, 1925, the registrar ordered the interveners to give further security as follows: 850*l.* in respect of the marshal's expenses, 300*l.* for costs, 456*l.* for loss of interest, and 3300*l.* in respect of possible loss of capital. On appeal Hill J. confirmed the registrar's order with the exception that the 850*l.* in respect of marshal's expenses was increased to 1520*l.*

E. C. M. T.

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*Nov.* 6, 10, 11, 13;
*Dec.* 9, 10.

DIVORCE.

## MART *v.* MART.

*Divorce—Adultery—Legitimacy of Child—Presumption of Legitimacy—Effect of Deed of Separation.*

The legal presumption of access, and of the legitimacy of a child, born during marriage, is rebutted by its conception during a period when the spouses are living apart under a deed of separation. For this purpose a deed of separation has the same effect as an order under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), that the wife shall not be bound to cohabit with her husband, or a judicial separation.

HUSBAND'S PETITION for a divorce.

The parties were married in June, 1922. They had lived together previously. On September 16, 1922, they executed a separation deed containing the usual covenant that the wife should not be compelled to live with her husband, and that her husband should pay her an annuity with the usual dum sola et casta clause. On January 14, 1925, the wife gave birth to a child. The husband filed his petition on April 8, 1925. The wife alleged that the husband had visited her and the child was his. This the husband denied.

The only point of law which arose in the case was whether the existence of the separation deed so far rebutted the legal presumption of access during marriage, as to make the husband's evidence of non-access admissible.

*D. Cotes-Preedy K.C.* and *H. B. D. Grazebrook* for the petitioner. It is settled that a decree of judicial separation is sufficient to rebut the presumption of access: *Hetherington* v. *Hetherington* (1); and Horridge J. in the recent case of *Andrews* v. *Andrews and Chalmers* (2) held that a magistrate's separation order under the Summary Jurisdiction (Married Women) Act, 1895, had the same effect.

*F. L. C. Hodson* for the respondent. A separation deed is merely an agreement by the parties to live apart, it cannot have the effect of a legal decision. The case is governed by *Russell* v. *Russell*. (3)

(1) (1887) 12 P. D. 112. (2) [1924] P. 255. (3) [1924] A. C. 687.

BATESON J. I have come to the conclusion in this case that the petitioner has succeeded.

The law as I understand it is this. If there is a child conceived and born after the marriage, a denial by the husband or wife of intercourse during marriage is not allowed. That seems to be the effect of *Russell* v. *Russell*. (1) A denial by the husband or wife of intercourse before marriage as to a child born after, is admissible: see *The Poulett Peerage*. (2) It is also admissible after a judicial separation or a separation order: see *Hetherington* v. *Hetherington* (3); *Andrews* v. *Andrews*. (4) I also think that evidence of the conduct of the husband or wife may be received as part of the res gestæ, but not as direct evidence of fact: see *The Aylesford Peerage* (5); and that case seems not to have been disapproved, if not in fact approved, by the learned Lords in their speeches in *Russell* v. *Russell*. (1) The grounds of *Russell* v. *Russell* (1) seem to me to be that it is contrary to law that evidence should be admitted to show that there had been no connection, and Lord Dunedin says (6): "Lord Halsbury, in an opinion concurred in by Lords Macnaghten, Davey, Robertson and Lindley, expressed himself in general terms." The passages are two. (2) "'As regards the rule which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be inquired into in any Court of law'; he then goes on to say that it does not apply to a period before marriage, and again he speaks of 'the principle wisely ingrafted, as I think, into our law which protects the sanctity of the matrimonial relation.'" Later he says (7): "If this evidence is rightly admitted it puts a weapon in the hands of a husband tired of his wife and anxious for a new start (for be it remembered this method of proving adultery is unavailable to the wife) the efficiency of which comes to depend upon the view of a jury upon a fact which

(1) [1924] A. C. 687.
(2) [1903] A. C. 395, 399.
(3) (1887) 12 P. D. 112.
(4) [1924] P. 255.
(5) (1885) 11 App. Cas. 1.
(6) [1924] A. C. 723.
(7) [1924] A. C. 726.

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hitherto has been thought to be one which ought never to be considered, except by the parties themselves, and it subjects the juries, where there is assertion and denial, to what I think is really an impossible task—namely, to find out which spouse is speaking the truth on a subject where no corroboration of either is possible." Of course in *Russell* v. *Russell* (1) the whole question was as to the acts of the parties themselves, where no corroboration could be possible.

Those seem to me to be the propositions which come from these cases. As far as I can see, there is nothing to prevent a spouse alleging intercourse, and in this case those allegations by the wife were made without objection. I did not believe her evidence. One of the questions here is: Can such evidence, which is excluded by *Russell* v. *Russell* (1), be given after a separation deed voluntarily entered into; and secondly, can I allow evidence of the conduct of the parties, apart from their own declaration, that is to say, their own direct testimony, as helping me to a proper conclusion? In my judgment I can. There is a further question, even if I am wrong about this: Have I sufficient evidence aliunde of non-access, which of course can always be given? Again in my judgment I have.

Now with regard to the deed. It is said that the Court cannot look at the deed because it offends against the rule in *Russell* v. *Russell*. (1) I do not think that it does so offend. It is an ordinary deed of separation with a covenant to live separate and apart, and in fact the parties did live apart under it. The deed has the same effect as a judicial separation or a separation order, because it parts by consent the two persons who sign it instead of by order of the Court. If it is right that a judicial separation or a separation order puts an end to the presumption of cohabitation, I think equally a deed does so.

Solicitors for petitioner: *Woodcock Ryland & Parker, for Hornby & Baker Jones, Newport, Mon.*

Solicitors for respondent: *Macdonald & Stacey.*

(1) [1924] A. C. 687.

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*Nov.* 18, 19;
*Dec.* 17,
18, 21.

## SNEYD *v.* SNEYD AND BURGESS.

KING'S PROCTOR SHOWING CAUSE.

SNEYD INTERVENING.

*Divorce—Adultery—Condonation—Condonation by Intercourse alleged to have been fraudulently obtained.*

Condonation has been defined as "the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with knowledge of all the circumstances of the particular offence forgiven." The petitioner in this case alleged, but in the opinion of the Court failed to prove, that he was induced to resume cohabitation by his belief, brought about by the fraudulent representation of his wife, that she was innocent.

*Semble*, such a belief would not be material if proved.

HUSBAND'S PETITION for divorce on the ground of his wife's adultery.

The petition was dated August 13, 1924; the wife and the alleged adulterer both put in answers denying the adultery. On the hearing neither the wife nor the co-respondent defended the action, and a decree nisi was made on January 27, 1925. The King's Proctor intervened in July, 1925, alleging that the petitioner had condoned and forgiven the adultery by resuming cohabitation with the respondent from February 25 to March 26, 1925.

The intervention came on for hearing on November 18, 1925, before the President and a special jury. The hearing was continued on November 19, when the petitioner admitted that marital intercourse had taken place as alleged, but stated that such intercourse was obtained by the respondent by fraud, and that he relied on further acts of adultery by the respondent both before and after the decree nisi. The petitioner was then given leave, by order dated November 19, 1925, to amend his answer by adding an allegation that the condonation was obtained by fraud. The further allegation as delivered stated that the respondent in conjunction with two men, Wilmer and Garrett, devised a scheme for tricking the petitioner into an act of sexual intercourse and the

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resumption of married life. She falsely represented to the petitioner that she intended to be a wife to him in every sense; that she was fond of him, and wanted to renew her married life, and that she had not committed adultery with the co-respondent or any man; and that he had believed her and resumed cohabitation, relying on her statements; but that he had afterwards found that she had no such intentions and had no affection for him, and had committed adultery not only with the co-respondent, but also with Wilmer and Garrett. Particulars were delivered of various acts of adultery. On December 3, 1925, the King's Proctor replied to the petitioner's amended answer, and in his reply admitted the scheme of the respondent in conjunction with Wilmer and Garrett, but otherwise joined issue on the amended answer, and further pleaded that the alleged fraud, if any, did not induce the condonation, and that the further allegations of adultery were irrelevant; and alternatively that if the matters alleged in the further answer and particulars were true, they afforded no answer to the King's Proctor's plea. The petitioner by his rejoinder, dated December 15, 1925, pleaded that the allegations of fact in the King's Proctor's reply were irrelevant. On December 9, 1925, the respondent obtained leave to intervene and plead; and on the same day delivered a reply to the petitioner's amended answer, by which she admitted the scheme, but otherwise traversed the answer and pleaded that the alleged fraud, if any, did not induce the condonation, and that at the time of the condonation the petitioner asserted and believed that she had committed adultery with Wilmer.

The further hearing of the intervention was continued on December 17 and 18, 1925.

The President held that the husband had failed to prove that he had acted on the belief alleged, but the case is reported for the sake of the President's discussion of the need for such belief in cases of condonation.

*Hawke K.C.* and *F. O. Langley* for the King's Proctor.

*Sir Patrick Hastings K.C.* and *T. Bucknill* for the petitioner.

*J. D. Cassels K.C.* and *Roland Burrows* for the intervener.

Counsel dealt entirely with the facts of the case. The result as found by the Court appears from the judgment.

*Cur. adv. vult.*

Dec. 21. THE PRESIDENT (LORD MERRIVALE). This is the intervention of the King's Proctor in the suit of the now respondent, Colonel Sneyd, in which he sought a decree of dissolution of marriage with his wife, the now intervener, Mrs. Sneyd, on the ground of her adultery with Burgess.

The case came to trial in January of this year. There was a short trial in which the case was presented with no striking circumstances. It appeared from the evidence that the respondent after her marriage had so behaved with regard to the man Burgess, with whom she had been on very friendly terms before her marriage, as to leave no doubt that he and she had committed adultery at the times and places alleged. Those matters were proved at the hearing.

The King's Proctor in July of this year intervened in the suit, and he alleged that there were divers matters relating to the conduct of the petitioner which had not been brought to the notice of the Court in particular; that the petitioner had condoned and forgiven the adultery of the respondent, and he specified conjugal intercourse continuing from February 25, 1925, until on or about March 26, 1925. He submitted those matters to the Court as matters not brought to the knowledge of the Court by the petitioner, and which ought to be within the knowledge of the Court while this suit was pending and before the decree nisi, which had been made on the date in January to which I have referred, January 27, should be made absolute.

The decree nisi being made on January 27, the decree absolute might have followed on July 27. Without some intervention by the King's Proctor upon the presentation of certain affidavits by those acting for the petitioner and upon the making of certain searches in the registry the decree nisi would have been converted into a decree absolute. The

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intervention of the King's Proctor was a very necessary and inevitable intervention when he became aware of the facts alleged in his plea, and its necessity and its importance has been very much emphasized in the course of the progress of this case.

I put it to Sir Patrick Hastings that if it had happened that the intercourse between the petitioner and the respondent in February of 1925 had been followed by the birth of a child and the decree nisi in this case had been made absolute in the ordinary course, that child would have been bastardized by the decree. Sir Patrick Hastings thought it was so. Some question was suggested with regard to it, but the gravity of the matter appears upon the possibility of such an occurrence, because the petitioner in this case is a man of property, and of established position in the county in which he has his home with a substantial real estate, and the result of a decree absolute in the ordinary course, if a child had been born as the result of the relations between the parties, would have been a most serious concern for a child begotten at a period when, upon the presumption of law, these parties were not and could not be honestly living together, if there was to be a divorce.

The simple case which I indicated just now having been presented to a judge in this Division on January 27 and the King's Proctor having made his intervention on July 28, as I have indicated, it is necessary to say a few words about the general character of the case. The respondent is a young woman. She had been at some earlier period married, and the name by which she was known at various times when the subject has been under discussion was Mrs. Alexander. She is a woman of great natural ability. The influence she exercised over the petitioner is evidence of what she was capable of in the way of influence over a person of the other sex, and her evidence and the evidence of other people have made it clear that she disregarded what I call the ordinary rules of morality, and she conceived herself to be at liberty to live upon terms of sexual intimacy with various persons. The petitioner was a man of substance and position. He

came to know the respondent a very considerable period before his marriage and before the matters here in question arose. He became aware of her mode of life and disregard of the ordinary rules of conduct and allowing herself that kind of licence to which I have referred. [His Lordship then stated the history of the case as above and continued :]

Grave questions have been raised as to what is condonation and what are its elements, and whether where conjugal cohabitation has been resumed fraud can be raised to bar the effect of that conjugal cohabitation and, if fraud may be raised, about what class of matters it can be raised. Some of these things are of moment far beyond the immediate importance of this case, although this is a case of great gravity between the parties. With regard to condonation, it has been often defined. It is defined by Sir Cresswell Cresswell in *Keats* v. *Keats and Montezuma* (1) with a definition that was subsequently approved by the full Court in which the Lord Chancellor was sitting with the Judge Ordinary and Whiteman J. of the King's Bench. The definition which had been made with great care by Sir Cresswell Cresswell and which was approved was this : " A blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed." That being impeached in the full Court, the Lord Chancellor delivered judgment to the effect that that definition was a correct definition. The Lord Chancellor also dwelt upon the matter with regard to the question of the element of forgiveness and what is the particular in which the element of forgiveness is to be considered. He said this (2) : " If it is true that forgiveness is an act of the mind, it can only be manifested by words or by outward acts. The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabitating with her, that they may conclusively establish condonation." The Lord Chancellor also said : " I see no reason at all to differ with the Judge Ordinary in the way in which he has stated the law of condonation."

(1) (1858) 1 Sw. & Tr. 334, 346. (2) 1 Sw. & Tr. 356, 357.

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As time went on it became apparent that there was of necessity an element in condonation which made the definition given by Sir C. Cresswell in *Keats* v. *Keats and Montezuma* (1), though it was suitable in that case, something other than an exhaustive definition, and in the case of *Bernstien* v. *Bernstien* (2) the Court of Appeal considered what is the condition upon which the effectiveness of condonation depends in respect of knowledge, and Lopes L.J., who delivered the leading judgment, said (3): "Condonation is the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with knowledge of all the circumstances of the particular offence forgiven." Complete forgiveness is stated as an element. Blotting out, I think, is intended to be an alternative statement of the same conclusion, and knowledge of all the circumstances of the particular offence forgiven is stated.

It is said here by counsel for the husband that at the time of his condonation there was knowledge only of the offence alleged in the petition. It is said also that there was no complete forgiveness and blotting out, because the forgiveness which took place was obliterated by a fraud practised for the purpose of procuring it. It is necessary then to consider what is alleged by the petitioner in respect of that requirement of the law in respect of condonation, which is expressed in the words "cohabitation must be with knowledge of all the circumstances of the particular offence forgiven." Sir Patrick Hastings has addressed me to draw me, if possible, to the conclusion that not knowledge but belief is the material point in condonation. I think there is grave reason to doubt whether the test in the Ecclesiastical Courts was, or whether the test now is, the test of belief, that is, the belief of the offended party. If the text-books are searched, it will be found that knowledge, which is stated by Lopes L.J. to be the material matter, is the condition precedent to the establishment of condonation which was laid down as of necessity in the Ecclesiastical Courts.

(1) (1858) 1 Sw. & Tr. 334, 346. (2) [1893] P. 292.
(3) [1893] P. 303.

Oughton's Ordo Judiciorum and much more recent works, including the text-books which were in use down to the time when the Matrimonial Causes Act was passed, show that in the general view of those who practised in the Ecclesiastical Courts condonation, as is said in Ayliffe's Parergon, "is when a husband or wife cognizant of the adultery of the other is voluntarily reconciled," or, as is said in Oughton, "is a voluntary reconciliation with knowledge." And the definition of the knowledge which is required is set out in Oughton, title 214, s. 3, and the kind of knowledge and the means by which it is required are set out: "Confession, evidence of witnesses, evidence of the personal knowledge and sight of the person aggrieved." I am not going to deal with the present case on this footing, but if the matter comes to be discussed at any future time, it must not be taken that I assume that where there is knowledge, the denial of belief does away with the effect of the knowledge. The case has been discussed at great length—not unnecessary length—and with much labour, and has involved great expense to the parties, and I propose to deal with it as though it were true that belief is the essential foundation of condonation, and as though a belief fraudulently induced withdraws the essential element in condonation.

So I come to consider what was the state of mind of the petitioner with regard to these three subjects as to which he says he has been fraudulently misled. He comes to the Court now and says: "I was induced to believe that the respondent was not guilty. I, therefore, forgave her. I believe she was guilty, and I therefore ask the Court to enforce this decree." It seems an odd thing if in so serious a matter as divorce the state of mind of one of the parties may have such consequences as it is suggested the state of mind of the petitioner has here. It is conceded that, except for the representations the respondent made to the petitioner at the hotel in Aberdeen, the facts of this case with regard to the adultery of the respondent with Burgess remain as they were to the knowledge of the petitioner at the time he went into Court to obtain a decree nisi. There are two

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questions involved here in this matter of belief as to her innocence with Burgess. First of all, did the petitioner so believe? Then, did the respondent induce the petitioner so to believe? That the respondent sought to induce the action of the petitioner founded upon the footing that he accepted her story of the matter is unquestionable. But I come to the other question: Did he believe, and did he cohabit with the respondent because he so believed? His own view of the practical situation was expressed in answers which he made to the effect that it was impossible to arrive at any other conclusion because the facts were so conclusive. I have to consider whether he did so believe. He tells me he did, and I cannot doubt that in the ordinary relations of life his word would be accepted, but I am satisfied he does not very well know what took place between his confrontation with the respondent in her room at the hotel at Aberdeen and his return to that room after an interval of time as her husband for the purpose of resuming cohabitation. He himself says: "She obsessed me." His learned counsel says: "He was infatuated with her." He says: "I believed she was not guilty." She said: "I sought to make him believe I was not guilty." It is for him to satisfy me that he believed she was not guilty, and he has not so satisfied me. With the knowledge he had of the facts as to the adulterous association of the respondent and Burgess, the declarations in her diary, and particularly at the latest date the matter of the photographs, it is to my mind impossible that an intelligent man should have believed a protestation of innocence, and I do not think the petitioner achieved that impossibility. The state of his mind was this: That as between him and her he was content that they should be reconciled and that he should act upon her assurances. No doubt he assured his friends that he had wronged her, but as to conviction in his own mind, he was convinced of her guilt upon the evidence. He received her back to her position of wife because only of his infatuation. I, therefore, find that the petitioner has not made out that he believed the respondent was innocent in relation to Burgess; that,

although she tried to persuade him into that belief, she did not successfully so persuade him, and his resumed cohabitation with her was not produced by that belief.

With regard to the representations as to her intention as a wife; that he believed he was in view of securing something like connubial happiness I can well understand, but just as I am not satisfied as to belief in her innocence of adultery with Burgess, so I am not satisfied that he acted upon any belief derived from her assurances as to the mode in which she would discharge her marital obligations. There is this further to be said on that subject, that if she was restored to her status of a wife, her duties revived, and they included all that could be reasonably required by a husband. I do not pause to consider whether affirmative assurances of the performance of a legal duty which were insincerely made could be ground for an allegation of fraud to avoid the effect of condonation. I do not pause to consider it because of the conclusion at which I have arrived.

There is the other matter as to her relations with third parties, whether the wife procured condonation by assurances that she was guiltless of all adultery. The petitioner has not satisfied me that she made such assurances. That there was jealous conversation with regard to Wilmer at some period in their relationship appears pretty clear, but the petitioner is so little possessed of knowledge as to what took place that he believed in the witness box he never met Wilmer at all. I am satisfied that the fact is that he met Wilmer and talked with him, and I think it is probably the fact that Wilmer was present upon the scene and showed him into the room when the petitioner says in his letter Wilmer did so; but, as I have stated, just as I am not able to attribute the conjugal cohabitation to fraudulent representations with regard to Burgess so I am not able to attribute the conjugal cohabitation to any fraudulent representations with regard to Wilmer and with regard to the other man who passed as McCormack or Garrett. Evidence has been adduced here in the affirmative of facts of adultery, from which I am asked to assume adultery as between the respondent and the two

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men who were named, and there has been evidence, on the other hand, of the absence of adultery. That issue in the case stands in a curious situation. If I found adultery here, in view of the other findings I have made, the petitioner could derive no advantage in this suit from that finding. If I found upon the evidence presented to me that adultery was not made out, it would not necessarily conclude the parties in any subsequent proceeding. It may be that that is a question which will come to be tried, but as it has ceased to be a practical issue in this case, and as it is an issue which one or other of the parties may desire to have tried out, although I have a definite view of my own with regard to it, I do not propose to state that view, because I think it is superfluous after the findings I have made.

The result of what I have said is that the petitioner has failed in his answer. What is established is that for a month after the decree nisi the petitioner and the respondent cohabitated conjugally and lived together as man and wife. The petitioner has sought to avoid the effects of that cohabitation on the various grounds I have stated of fraud and fraudulent intent to induce condonation. He has not made out any of the material allegations in his plea. I say that with due regard to the reservation I made. He has not made out any of the allegations which are material upon the King's Proctor's plea, and the King's Proctor's plea, therefore, must be allowed.

*Mr. Langley.* On that I ask that the decree nisi may be rescinded and the petition dismissed. Those are the terms of prayer.

THE PRESIDENT. Yes.

Solicitors: *The King's Proctor; Kenneth Brown, Baker, Baker; Amery Parkes & Co.*

J. R. B.

ADMIRALTY.

1926
*Jan.* 11.

## THE VIPER.

*Shipping—Collision—Duties of Vessel at Anchor.*

The plaintiffs' sailing barge *T.*, bound up the River Thames, ran into the defendants' sailing barge *V.*, at anchor. The judge of the Mayor's and City of London Court held the *T.* to blame, but held the *V.* also to blame for not sheering when the collision was imminent. On appeal:—

*Held*, that the *V.* was free from blame, as her master was entitled to assume that the *T.* was able to keep out of the way of the *V.* until the vessels were very close to each other, and that there was then not enough time for him to sheer his barge out of the way.

Per Hill J. While a ship at anchor is not entirely free from duties towards a ship under way, the ship at anchor ought not to alter her position or heading until it is apparent to her that the ship under way cannot by her own unaided action avoid a collision.

APPEAL from the Mayor's and City of London Court in an action of damage by collision.

The plaintiffs (respondents) were the owners of the sailing barge *Truelove;* the defendants (appellants) were the owners of the sailing barge *Viper*. The collision took place on the morning of October 14, 1924, in St. Clement's Reach, River Thames. The tide was flood with the force of about three knots, and there was a light easterly air. The *Viper*, a sailing barge of about 200 tons, laden with 170 tons of chalk, while dredging up the river with the tide with her anchor down, had fouled something in the bed of the river and had been held by her anchor for about two hours when she was run into by the *Truelove*, a sailing barge of 45 tons, which was proceeding up the river, light, under full sail, making about a knot through the water.

The plaintiffs' case was that the *Viper*, preceded by another sailing barge, the *Arrow*, was dredging up the reach about a quarter of a mile ahead of the *Truelove*, and that when that vessel was only two or three ships' lengths away the *Viper* suddenly brought up, and so caused the collision. The learned judge, however, found that the *Viper* had been, as she alleged, at anchor for some two hours, and that the *Truelove* was keeping a bad look out. He held the *Truelove*

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to blame, and from that finding there was no appeal. But he also found that if a better look out had been kept on board the *Viper* she could have avoided the collision by taking suitable steps by sheering. He accordingly held both barges to blame in equal degrees.

The defendants appealed.

*E. A. Digby* for the defendants. It would be a very dangerous proposition to lay down that a vessel at anchor in the position of the *Viper* ought to sheer in either direction, even if (which the defendants deny) there was time for her to do so. She might cause the very collision she was trying to avoid if, at the same moment that she acted, the vessel under way took the opposite action. The learned judge in his judgment quoted a passage from Marsden's Collisions at Sea, 8th ed., p. 447: "A vessel brought up in a frequented channel should have an anchor watch ready to sheer her clear of an approaching vessel or to give her chain." Neither of the two old nisi prius cases (*Lack* v. *Seward* (1) and *Vanderplank* v. *Miller* (2)), cited for that proposition, bear it out. There are also many cases in which vessels at anchor have been held to blame for not taking timely action, but they are cases in which both were at anchor and one or other dragged or sheered. In the circumstances of the present case it was not incumbent on the master of the *Viper* to do anything.

*R. F. Hayward* for the plaintiffs. If by the exercise of reasonable care the vessel at anchor can avoid a collision she must do so. Very slight action on the part of the *Viper* would have avoided the collision. The wind was so light that the *Truelove* was practically helpless, and the *Viper* in the strong tide could more easily have avoided the collision by sheering than the *Truelove* could by her helm action. The master of the *Viper* was hailed to put his helm over hard-a-port in order to sheer the barge, but he did not do so.

No reply was called for.

(1) (1829) 4 Car. & P. 106. (2) (1828) Moo. & M. 169.

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THE PRESIDENT (LORD MERRIVALE). This case raises a question of some little nicety on the facts. The parties economized in the Court below by omitting to secure the presence of nautical assessors. The case in fact turns upon a question of nautical skill and practical knowledge of the handling of craft. [His Lordship stated the facts and continued as follows:] The judge came to the view that the *Truelove* was to blame for having no sufficient look out coming up the reach, and that if she had apprised herself of the position of the *Viper* at a reasonable period before the danger of collision was imminent no collision need have occurred. Against that finding there is no appeal. But the judge considered that the *Viper* ought to have done something when she was threatened with the collision, to avoid the impending risk. He said: "I am not satisfied that there was a sufficient look out on the other vessel. If there had been a better look out she could have sheered."

The difficulty which arises is that there is not before us any distinct evidence of the burden of the obligation which the judge puts upon the master of the *Viper*. She was at anchor, and could have been seen to be at anchor by an approaching vessel which kept a good look out, and prima facie was to be avoided by vessels under way. Consequently she was entitled to expect, as long as it was reasonable to expect it, that she would be avoided by the *Truelove*. But there is an obligation on the anchored vessel to keep a look out, and, if conditions arise in which action is required, to take the action which persons of reasonable competence would take in the circumstances. The difficulty is in ascertaining what is the action which the judge thinks the *Viper* ought to have taken. He regretted that as the case shaped itself he had not the assistance of assessors. We have been able to consult the Elder Brethren on the subject, and they tell us that the master of the *Viper*, with the weather and tide described, might reasonably have assumed that the *Truelove* was in control of her own course at a distance of 300 feet and probably at even a shorter distance. The master of the *Truelove* himself appreciated the danger

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from the *Viper* at a distance of no more than two or three lengths. There was a three knot tide, and he was making his course up the reach at about four knots over the ground with the light wind there was at the time. That 300 feet took less than a minute in which the master of the *Viper* was warned that some action should be taken. It was pointed out by Mr. Hayward that a slight change of heading would at any rate have minimized the force of the collision, and that is manifestly true. But the master of the *Viper* was in this position. Ahead of the *Truelove* was the *Arrow*, which passed clear, and the *Truelove* was discovered behind her. What could the master of the *Viper* have done? We are advised that he could not safely have paid out chain until he had sheered and got a heading, and that that would have taken him about half a minute; and that to have paid out chain sufficiently to be shifted substantially would have taken more than another minute. But the problems which arise in a situation of this kind cannot be answered by arithmetical calculations, the human factor enters into the case. Here was the master of a barge which had been in difficulties for upwards of two hours and had the protection afforded to a barge at anchor. In that situation a barge under way approaches and comes within a distance which necessitates action—if action is to be taken—within less than a minute. The burden of proof is on the *Truelove*, and having availed ourselves of the assistance of the Elder Brethren, for my part I come to the conclusion that the *Viper* ought not to be held to blame and that the *Truelove* is alone to blame. The appeal accordingly will be allowed with costs.

HILL J. I agree. The *Truelove* was a ship under way and the *Viper* was a ship at anchor. A ship at anchor is not entirely free from duties towards a ship under way, but in my view it would be very dangerous, and only lead to collisions, if it were thought that the duty of a ship at anchor was to alter her position or heading at any time short of the moment when the situation is such that the ship under way cannot by her own unaided action avoid a collision. If the ship under

way is powerless to act, as it is said here the *Truelove* was, the ship at anchor is not to suppose that state of things to exist without warning that the ship is powerless to act; and up to the time when it becomes apparent to her that the ship is powerless to act the ship at anchor is entitled to assume that the ship under way will act and will avoid the collision.

It is clear that up to the time the barges were very near each other the *Truelove* could have avoided the *Viper*. The master of the *Viper* must have some little time to consider what he shall do, and on the advice we have received I am clearly of opinion that it cannot be said that there is anything which the *Viper* ought to have done or could effectively have done. As to sheering, it is possible that it could have been done within a limited time, but the question still remains as to the direction of the sheering, and having regard to the presence of the *Arrow* it is impossible to say that the master of the *Viper* was negligent in not making the particular sheer which it is now alleged he ought to have made. As to putting out chain, clearly, on the advice we have received, there was no time to do that. I agree therefore that a case of blame against the *Viper* has not been made out.

*Appeal allowed.*

Solicitors for the plaintiffs: *Keene, Marsland, Bryden & Besant.*

Solicitors for the defendants: *R. S. Jackson & Bowles.*

E. C. M. T.

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DIVORCE.

## HARGREAVES *v.* HARGREAVES.

*Divorce—Practice—Ante-nuptial or post-nuptial Settlements—Definition—Jurisdiction of Divorce Division—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192.

The expression "ante-nuptial or post-nuptial settlements," in the Divorce Acts and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, does not, as regards the parties whose marriage is the subject of the decree, include a settlement of the property of either spouse not made in contemplation of any particular marriage, but giving the spouse power to appoint an interest to any future wife or husband.

By an indenture of settlement, dated April 28, 1914, made between Dennison Braddyll Hargreaves, then a young man of twenty-one years of age, of the first part, C. Hargreaves, his widowed mother, of the second part, and two trustees of the third part, certain reversionary property of the young man was assigned to trustees upon trust, subject to the life interests of his mother, to pay the income of the said property to the settlor for life and after his death upon the usual trusts in favour of his children or issue as he should appoint and in default of appointment in equal shares at twenty-one or marriage, with an ultimate remainder to such uses as the settlor should appoint.

The settlement contained a power for the settlor to appoint by deed to or for the benefit of any wife an interest in the trust premises or any part thereof. This settlement contained no other reference to the marriage of the settlor.

By a deed of appointment made on May 25, 1914, after a recital that a marriage had been agreed on between the settlor and E. M. P. Macdonald, the settlor appointed to her after the marriage a sum of 500*l.* a year to be paid during the continuance of the coverture for her separate use without power of anticipation.

The parties were married on June 9, 1914. The bride brought nothing into settlement. There was issue, one child born on January 5, 1920. On May 6, 1924, the marriage was dissolved by decree nisi on the wife's petition on the ground

of the husband's cruelty and adultery. The decree was made absolute on November 17, 1924.

A petition was presented by the wife for variation of the settlement; the registrar by his report on the petition submitted that the deed of appointment of May 25, 1914, should be varied by directing the trustees to pay the yearly sum of 500*l.* to the petitioner for life instead of during coverture only. The report also contained the following passage: "On the appointment before me the petitioner argued that the settlement of April 28, 1914, should be varied by directing the trustees to pay one-third of the reversionary interests settled by the respondent when the same should fall into possession to the petitioner for life. Counsel for the respondent opposed, contending that the petitioner was not a party to that settlement and the settlement was not such an ante-nuptial settlement made on the parties," as the Court had power to vary under s. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61).

*Noel Middleton* for the wife. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 5, which substantially re-enacts the Matrimonial Causes Act, 1859, gives jurisdiction over "ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree." The intention of the Act is to include every settlement made on either spouse. In the present case the power to appoint an interest to any "wife of his" clearly brings the case within the purview of the section. Unless a settlement in the present form is variable by the Court, an ingenious solicitor could always oust the jurisdiction of the Court by omitting the bride's name. To construe the meaning of "parties" in the Act to mean in every case both parties would be to narrow down the construction.

In *Blood* v. *Blood* (1) Gorell Barnes J., speaking of the section in the old Act of 1859, says: "Those words are extremely wide, and I am anxious that they should not, by any construction the Court may put upon them, be narrowed

(1) [1902] P. 78, 82.

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in any way. To narrow them would be undesirable for this reason: the various circumstances which come before the Court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the Court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case."

[He also referred to *Morgan* v. *Morgan and Kirby* (1) and *Loraine* v. *Loraine and Murphy*. (2)]

*Cotes-Preedy K.C.* for the husband. The construction contended for would be justified only if after the word "parties" the words "or either of them" were added. In this case the settlement dealt with the husband alone. The only settlement made on the wife was that of the sum appointed to her by her husband.

*Bush James* for the trustees.

HILL J. There having been a registrar's report, this is a motion, by the wife, the petitioner, to vary, and the point is this. On April 28, 1914, there was an indenture of settlement executed between the husband, his mother, and certain trustees. He came of age on April 5, and that settlement is not expressed to be in contemplation of marriage, nor is his future wife mentioned in it at all, but there are provisions which contemplate the possibility that the young man may thereafter marry and which give him certain powers of appointment and there are certain provisions in the event of his marrying. On May 28 he exercised his power of appointment in favour of the petitioner, whom he married on June 9, 1914, to the extent of 500*l.* per annum.

The question is whether there is any settlement within the meaning of s. 5 of the Act of 1859 or s. 192 of the Act of 1925, other than the appointment, and whether there is any property settled other than the 500*l.* In my view there is not. Mr. Middleton's argument comes to this. He says that any settlement inter vivos made upon either of two people who at any subsequent date marry is a settlement which

(1) [1923] P. 1. (2) [1912] P. 222.

the Court can deal with under the section, because it is ante-nuptial, and that any property dealt with by such a settlement is to be regarded as property settled. In my view that cannot be. This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because what it is dealing with is what we commonly know as a marriage settlement, that is, a settlement made in contemplation of, or because of, marriage, and with reference to the interests of married people, or their children. Nobody has referred me to any case in which it is said it has any wider meaning. The judgment of the Court of Appeal in *Loraine* v. *Loraine and Murphy* (1) shows that it has not a wider meaning than that.

In the same way, to my mind, the property settled is not the whole fund out of which the 500*l.* was carved, but it is the 500*l.* and nothing else.

Therefore, I think Mr. Middleton's contention for the wife is wrong, and so far the report of the registrar must be confirmed.

It was asked secondly that the sum of 166*l.* per annum, which is ordered to be paid as permanent maintenance for the wife, should be directed to be secured, but I have not any materials before me upon which I can say that the registrar was wrong in not making any order for security. Apart from that sum, he is giving the whole of the 500*l.* which was appointed to her, and that is secured. He had all the facts before him, and I have no reason to doubt that he has exercised a wise judgment when, having secured to her 500*l.* a year, he directs that a further 166*l.* is to be paid not as a secured sum, but as an annual payment. When the husband subsequently becomes more wealthy under this deed it may be that it will be an advantage to her that she can get her 166*l.* increased.

I confirm the registrar's report.

Solicitors : *Thompsons, Quarrell & Attneave, for Pickstone & King, Radcliffe, Lancs ; Royds, Rawstorne & Co.*

(1) [1912] P. 222.

J. R. B.

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19, 29.

ADMIRALTY.

## THE MOSTYN.

*Shipping—Damage to Dock Works—Non-liability of Shipowner for Damage caused without Negligence—Harbours, Docks, and Piers Clauses Act,* 1847 (10 *Vict. c.* 27), *s.* 74.

By s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, "the owner of every vessel . . . . shall be answerable to the undertakers for any damage done by such vessel . . . . to the harbour, dock, or pier, or the quays or works connected therewith. . . . ." Without negligence on the part of the defendants or their servants, while entering the plaintiffs' dock the anchor of the defendants' steamship fouled and damaged an electric cable belonging to the plaintiffs. The cable, which supplied lighting power to the docks, was laid in a sunken chaseway in the bottom of the communication channel leading to the dock:—

*Held*, (*a*) that the damage was done "by the vessel" and to "works connected" with the dock; but that (*b*), following the construction apparently put upon s. 74 by the majority of their Lordships in the House of Lords in *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. 743, where negligence is disproved, liability for damage does not lie upon an owner whose vessel while in the control of his servants has damaged a dock or works in connection therewith, i.e., the section contemplates injuria cum damno; and that accordingly the defendants were entitled to judgment.

Action of Damage.

The plaintiffs were the Great Western Railway Company, owners of the docks at Swansea; the defendants were the owners of the steamship *Mostyn*. The facts are fully set out in the judgment. Shortly stated, the plaintiffs' allegations were that by the negligence of the defendants' servants the *Mostyn's* anchor dragged along the bottom of the communication channel leading to the Prince of Wales' Dock and fouled and damaged an electric cable laid in a sunken chaseway on the bottom of the channel. In the alternative they alleged that the damage complained of was damage done by the *Mostyn* to a harbour, dock, or pier, or works in connection therewith, and that the defendants were answerable therefor to the plaintiffs as undertakers of the said harbour, dock, pier, or works by reason of s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847 (incorporated in the plaintiffs'

various Acts relating to the docks at Swansea), as amended by s. 15 of the Pilotage Act, 1913. (1)

The defendants denied negligence, alleged that the fouling of the cable was, so far as they were concerned, an inevitable accident, and that the presence of the cable unadvertised and unmarked constituted a nuisance obstructing the highway. They also denied that the damage to the cable was damage done by the *Mostyn* to a harbour, dock, or pier or works in connection therewith.

*W. N. Raeburn K.C.* and *Wilfrid Lewis* for the plaintiffs. [In view of the finding that the defendants were not guilty of negligence the arguments and cases cited on the question whether, if there was antecedent negligence, the chain of causation was broken by the *Mostyn* having fouled a cable belonging to the Postmaster-General before she fouled the plaintiffs' cable, are omitted.] Assuming the Court should be of opinion that the fouling of the cable was accidental and unavoidable the defendants are nevertheless "answerable" under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847. The decision in *Dennis* v. *Tovell* (2) is still good law where there is some one in charge of the ship doing the

(1) Sect. 74 provides that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

Sect. 15 of the Pilotage Act, 1913, provides that: "Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory."

(2) (1872) L. R. 8 Q. B. 10.

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damage, and the statement in the headnote to the Court of Appeal report in *River Wear Commissioners* v. *Adamson* (1) that the latter case overrules *Dennis* v. *Tovell* (2) is incorrect. It is admitted that the language of Blackburn J. in *Dennis* v. *Tovell* (2) is too wide, and that it is difficult to extract the real ratio decidendi from the judgments and speeches of the ten judges who decided *River Wear Commissioners* v. *Adamson* (3) in the Court of Appeal and House of Lords ; but it is submitted that the latter case only reverses *Dennis* v. *Tovell* (2) to the extent of laying down that, where there is no one on board and the vessel is driven against a harbour or dock works by the force of the elements, the owner of the vessel is not liable. In the Court of Appeal, where it was held that there was an implied exception of the act of God, Mellish L.J. certainly was of opinion that s. 74 extended the common law liability of shipowners, and so apparently was Pollock B. In the House of Lords, where the decision of the Court of Appeal was upheld, although the majority of their Lordships agreed that there was no exception of the act of God, Lord Cairns alone definitely stated that in his opinion no new right of action was created ; Lord Gordon in terms took the opposite view ; Lord O'Hagan was of opinion that some act of man was essential and that in the peculiar circumstances of the case the section was not applicable. The speech of Lord Blackburn is contradictory. He states that the object of the section was to give more protection to owners of harbours, and that therefore the shipowner was to be liable without proof either that there was negligence or that the negligent person was his servant. On the other hand he dissented from his previous decision in *Dennis* v. *Tovell* (2) and from the view that some one must be in charge in order to make the shipowner liable. The compulsory presence of a pilot under the last part of the section relieved the shipowner (until s. 15 of the Pilotage Act, 1913, made the shipowner liable for the negligence of a compulsory pilot), but the fact that that particular matter was specially provided

(1) (1876) 1 Q. B. D. 546. (2) L. R. 8 Q. B. 10.
(3) 1 Q. B. D. 546 ; 2 App. Cas. 743.

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for, shows, as Russell Q.C. (as he then was) said in the course of the arguments in the House of Lords, that "the general liability of the owner was intended to be most extensive." The result of the case, whatever the exact ratio decidendi, is that the majority do not found their decisions on the necessity of proving negligence. The difficulties of the case were referred to in *Postmaster-General* v. *Beck and Pollitzer* (1), where Atkin L.J. said: "To try and determine the real ratio decidendi of the decision of the House of Lords in *River Wear Commissioners* v. *Adamson* (2) is a task which has already taxed much greater authorities than I profess to be, and I am glad to be relieved of it."

*Langton K.C.* and *Carpmael* for the defendants. The defendants by their servants were not guilty of any negligence and under those circumstances they are not liable to the plaintiffs. Sect. 74 merely gives a right of procedure against the shipowners in any case in which a ship has damaged a dock or works in connection therewith, possibly to provide a remedy in cases where there has been a charter by demise of the ship—a form of contract much more common fifty years ago than it is now. The shipowner shall be "answerable" merely means that he is the person to be sued. The liability cannot depend on whether any one was, or was not, on board the vessel at the time the damage was done; either proof of negligence is necessary or, as in cases under the Telegraph Act, 1878 (cf. *Postmaster-General* v. *Beck and Pollitzer* (3)), it is unnecessary; there can be no half way house. If the plaintiffs are right in their contention it is strange that in the course of over fifty years the distinction has never been made. No text-book suggests that *Dennis* v. *Tovell* (4) is now good law under any circumstances, and no support for that contention can be obtained from the majority of the decisions delivered in the *Wear Commissioners* case. (2) On the fair reading of s. 74 it would seem that negligence is contemplated and that the section relates to procedure only, a view which is borne out by the terms of s. 76, which enables

(1) [1924] 2 K. B. 308, 314.
(2) 2 App. Cas. 743.
(3) [1924] 2 K. B. 308.
(4) L. R. 8 Q. B. 10.

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the shipowner to recover from his servants who have been negligent the amount which he has had to pay to the undertakers. If the Legislature had intended to impose a liability irrespective of negligence one would have expected to find words similar to those in s. 8 of the Telegraph Act, 1878. The fact that before the Pilotage Act, 1913, shipowners were relieved from liability if they had a compulsory pilot on board does not show, as the plaintiffs contend, that the general liability under s. 74 was intended to be most extensive, but the exact contrary—namely, that, where there is no negligence on the part of the shipowner's servants, s. 74 does not impose any liability on him. Further, the damage was not done "by the ship," nor are electric cables "works in connection with" the dock within the meaning of the section.

*Wilfrid Lewis* replied.

*Cur. adv. vult.*

Jan. 29. THE PRESIDENT (LORD MERRIVALE) read the following judgment: The plaintiffs are the owners of the docks at Swansea. In a masonry chaseway at the bottom of the communication passage, which leads from the King's Dock lock to the adjoining Prince of Wales' Dock, electric cables are laid for lighting purposes and the supply of power. Damage done to one of those cables through fouling by the anchor of the steamship *Mostyn*, owned by the defendants, is sought to be recovered by the plaintiffs in this action. The plaintiffs founded their action in the first instance upon allegations of negligence, but by an amendment, made after the pleadings upon the case so framed had been closed, they allege that "the damage complained of was damage done by the *Mostyn* to a harbour, dock, or pier, or works connected therewith; and the defendants are answerable therefor to the plaintiffs as undertakers of the said harbour, dock, pier or works by reason of s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, as amended by s. 15 of the Pilotage Act, 1913." The case of negligence on which the plaintiffs originally proceeded raised some interesting questions of fact

and gave rise to a learned and able discussion as to the proximate and remote causes of damage. The amended claim involves the decision of a question upon provisions of the statute of 1847 which were found in the Court of Appeal and in the House of Lords, about fifty years ago, to be difficult of construction, and as to which in the meantime nothing has been determined.

The case of alleged negligence arose under curious circumstances. The casualty occurred at night, and was the sequel of an accident which caused the *Mostyn* to be suddenly held up at the entrance of the passage in question. Entry to the passage is controlled by the plaintiffs' officers. Another steamship, the *River Dee*, was ordered on, and, while she was making her transit, the *Mostyn* was ordered to proceed. Through some breakdown which was not explained the *River Dee* stopped and blocked the way at a time when the *Mostyn* was 300 feet or less from the entrance. To bring up the *Mostyn* it was necessary to put her engines astern and drop her port anchor. When the way ahead was again clear engine action with helm action was required to square the vessel's head for the passage. As soon as she had been brought to the correct heading engine action ahead was ordered, quite properly, and an order was also given, properly and at the right time, to heave up her anchor. The advance of the *Mostyn* to the passage way and the bringing of her anchor awash would in ordinary course have taken place concurrently. On the floor of the dock outside the passage way there lay, however, a cable the property of the Postmaster-General, said to have been laid by his authority, the exact situation of which at the time in question is not definitely ascertained. As to its presence no notice was given, and there were no indications apparent to those using the docks. The anchor of the *Mostyn* fouled, or was fouled by, this last mentioned cable, and by reason of such fouling was held down as the *Mostyn* advanced into the passage, with the effect that by the combined operation of the vessel's winch and of the fouled cable the anchor's fluke dragged upon the cables lying in the chaseway under water on the floor of the passage and

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carried away the cable in question from its attachments in the plaintiffs' distributing chamber on shore.

The allegations of negligence which were relied upon by the plaintiffs included these: that a tug was necessary for the safe management of the *Mostyn* in her passage, and, negligently, was not employed; that dragging an anchor in the passage way was a negligent act; that the *Mostyn's* anchor was negligently dropped and negligently raised; and that her speed at the material point of time was improper. The defendants by their pleading alleged that the pilot who was on board the *Mostyn* was the servant of the plaintiffs and that she was under his control. In view, though, of the judgment of Hill J. in *Swansea Harbour Trustees* v. *The Lingedijk* (1) contentions which could be founded on such a state of facts, if correctly alleged, were not persisted in. The defendants did not admit that the cable in question was dragged from the chaseway, and they contended that the plaintiffs had been guilty of negligence in omitting to give any notice of the presence and situation of their cables, and that this negligence was the cause, or a contributory cause, of the casualty.

There was in fact no notice or warning of the position of the plaintiffs' cables. The pilot had no clear knowledge of their situation, and it would have been well that he should have had. The master of the *Mostyn* insisted that the existence of the cables should have been marked in some way on the wharves above. But the master and pilot were agreed—and, as I am advised, it is a sound view—that it would be improper to drag an anchor on the ground in a passage like that in question. The dispute about notice is therefore immaterial. The defendants raised questions of fact as to the position of the plaintiffs' cable when the *Mostyn* fouled it, and as to whether it was properly sunk in the chaseway. I see no reason to doubt that it had been carefully laid in the chaseway—and I so find—and there was no evidence of its having been disturbed before the time of the occurrence now under consideration. In view of the finding I have

(1) (1922) 13 Ll. L. R. 153.

made as to the use of an anchor in the passage, this matter is of no substantial materiality.

Some discussion arose with regard to the lawfulness of any use of the *Mostyn's* anchor in the dock in which it was used, there being sections in the Swansea Harbour Act, 1854 (s. 81), which prohibits use of anchors in the docks except under circumstances not existing in this case. There is, however, a bye-law in force in the docks (Bye-Laws, 1920, No. 7) which contemplates the use of anchors within the docks in case of need, and I am satisfied that at the time in question the plaintiffs by their officers knew and approved the use of an anchor there in cases like this in the manner in which the defendants' master and pilot intended that the anchor of the *Mostyn* should be used.

The pilot of the *Mostyn*, when he went on board, recommended her master to employ a tug in the passage from the lock to the dock. There was wind estimated at force seven —a moderate gale—and this was advanced as a reason for holding that to proceed without a tug was negligent. The *Mostyn* proved to have no need of a tug so far as the passage was concerned. By means of engine and helm action her movements were well and efficiently controlled. It was said, and perhaps truly, that if she had been held up by a tug she need not have let go an anchor when her progress was interrupted, and therefore that the damage to the plaintiffs' cable was a consequence of the master's refusal to take a tug. I have consulted the Elder Brethren on this matter and they advise me that the *Mostyn's* engine and helm action were correct, and that the occasion did not call for the employment of a tug, and, that if a tug had been employed, the anchor would no doubt, under the circumstances of sudden difficulty which arose, have been let go. I accordingly dismiss this charge of negligence and the interesting question of the proximity or remoteness of the damage alleged does not arise.

The further allegation of negligence which was made with regard to the use of the anchor of the *Mostyn* arose upon the fact that the anchor was not raised, as the master and pilot

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expected it would be, before the vessel entered the passage, and that it dragged on the ground upon the chaseway where the cables had been laid. The order to heave up was given at the right time, and it was promptly obeyed, but the operation was delayed by the fouling of the Post Office cable. The mate kept observation on the chain, and he in fact saw that the anchor, when it came in sight, carried with it that and another cable. After discussing the matter with the Elder Brethren I accept the view they hold that neither the master, the pilot, nor the mate can properly be found guilty of negligence with regard to the use and the lifting of the anchor.

On the whole case I come to the conclusion that the damage caused by the plaintiffs' cable was not negligently caused, but was, so far as the defendants were concerned, accidental and in the circumstances unavoidable. It is necessary therefore to deal with the claim raised by the amended statement of claim, para. 6, founded upon s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847.

While the language of s. 74 was under discussion certain of the terms there employed presented themselves for particular consideration, and more especially the phrase—"damage done by such vessel." Is the word "vessel" used in the sense of the definitions in the Merchant Shipping Acts, or with the wider meaning which is commonly given to it in this Court in inquiries into damage, where one "vessel" or another is held "to blame" or "free from blame"? Must damage be said to be done "by" the vessel although the immediate cause of the fact of damage is extraneous to the ship and not due to any act or omission of the ship's company or of any person having control of her; or, indeed, is suffered in spite of their utmost efforts to avoid the casualty? Does "damage" mean all injury causing loss or is it used to describe what is commonly called "actionable damage"? The answer to the last mentioned question may be the decisive factor in this case. The damage was, I think, "done by the vessel," within the meaning of the section, in the sense that she was so handled that her anchor fouled the cables and

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broke them. What is necessary is to ascertain, this mishap having come about without negligence of the *Mostyn's* owners, master or crew, or her pilot, whether the statute casts upon her owners liability for the loss it caused to the plaintiffs. A question was raised as to whether the cable in question comes within the description of " works connected with " the undertaking of the plaintiffs. Not without doubt, upon examination of the various sections which bear upon the matter in this Act and the amendment Act of 1862, I think it does.

There are decisions as to the effect of s. 74, and counsel on each side relied on them in claiming judgment in the event of a finding that the damage done to the plaintiffs' cable was not due to negligence. In *Dennis* v. *Tovell* (1) Blackburn J., as he then was, delivered a concise judgment of the Court of Queen's Bench of which the material words are these : " It is clear that the Legislature, whether intentionally or not, has made the owner of a vessel liable for all damage, whether caused by negligence or wilful neglect, or by inevitable accident from stress of weather." In *River Wear Commissioners* v. *Adamson* (2), however, the Court of Appeal held that damage done by a vessel to a pier but caused by what is called " act of God " is not recoverable under the section, and upon appeal the judgment was upheld in the House of Lords. (3)

*River Wear Commissioners* v. *Adamson* (3) was a case of a steamship, the *Natalian*, overtaken at sea by a violent storm, driven ashore by force of the storm at the entrance of a dock, quitted there by her crew in imminent peril of their lives, and cast by sea and wind against a harbour pier which was thereby damaged. " The vessel floated, canted round, and struck and injured the pier." The Court of Queen's Bench found itself bound by the decision in *Dennis* v. *Tovell* (4) to hold the owner of the *Natalian* liable for the damage. The Court of Appeal pronounced against the claim " on the ground "—as stated by Chief Baron Kelly—" that it

(1) L. R. 8 Q. B. 10, 12.
(2) 1 Q. B. D. 546.
(3) 2 App. Cas. 743.
(4) L. R. 8 Q. B. 10.

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is implied in the Act of Parliament that the exception of the act of God will protect the owner against the liability imposed by the literal terms of the enactment."

The House of Lords (1), while it upheld the decision of the Court of Appeal in *River Wear Commissioners* v. *Adamson* (2), did not concur in the reasons upon which the judgments given in that Court had proceeded. Material differences in point of principle appear when the opinions pronounced by their Lordships are examined. Indeed it was argued before me, on behalf of the present plaintiffs, that the whole effect of the case is no more than to exempt the owner of a vessel, cast by irresistible force of the elements against a pier, from liability in an action for damage caused by the impact. Counsel relied upon various passages from the speeches of noble and learned Lords in support of his argument that, under s. 74, an owner must in general be held liable for damage done by his vessel to the works of a dock undertaking even though no proof of negligence can be made against him. Counsel for the defendants, on the other hand, contended that upon the reasoning and the specific conclusions found in the opinion of the Lord Chancellor, Lord Cairns, the defendants are entitled to judgment. It is undoubtedly true that among the conflicting opinions expressed in the discussion of the *River Wear Commissioners* case (2) in the House of Lords the pronouncement so relied upon is distinguished by definite certainty of view, and if its conclusions are not displaced by those of other of their Lordships it is clear authority for holding that the liability cast on owners is liability only for what is sometimes called actionable damage. It is equally true, however, that the judgment of the House proceeds on different and less positive grounds. Still the case does at least determine that the liability for damage imposed upon owners by s. 74 is not absolute in all circumstances.

What is left undetermined by *River Wear Commissioners* v. *Adamson* (2) is whether the generality of the words creating

(1) 2 App. Cas. 743. (2) 1 Q. B. D. 546, 553.

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liability is limited only by an exception or exceptions applicable to some particular state or states of facts—for example, to what may be concisely called the case of the *Natalian* and like cases—or whether there is some rule of construction, plain and definite, as the words of the section are in their prima facie meaning, whereby dock proprietors and shipowners are informed of their respective rights and liabilities.

The dissent expressed in the House of Lords from the main ground of the decision of the Court of Appeal in *River Wear Commissioners* v. *Adamson* (1) does not extend—at least in the case of some of their Lordships—to the whole reasoning of the Lords Justices. For instance, exception was made by some of their Lordships in favour of certain passages in the judgment of Mellish L.J. Two of the opinions expressed by Mellish L.J. bear on the present case. "I am of opinion" —said the learned Lord Justice—"that the statute only contemplates the case where either directly or indirectly, through the act of man, the vessel is caused in some way or other to run against the pier." And further, "I am bound to agree . . . . that the section points to something that is done by the act of man, or to the act of the person in charge. It looks as though the Legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable." Lord Hatherley, while he differed from the reasoning on which generally the Court of Appeal had proceeded, said: "Possibly the expression of the late Lord Justice Mellish may come nearer to the mind of the Legislature. . . . . His notion of the general intent of the clause is this: that it points to something in which man is concerned . . . . that is to say, in which human agency intervenes." Lord O'Hagan agreed in this opinion: "It may be just," he said, "that the owner should

(1) 2 App. Cas. 743, 754, 759, 772.

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answer if the injury arises from the actual or presumed default of his servants." Lord Blackburn, at the close of a comprehensive survey of the legal aspects of the problem, said this: "I am not prepared to say that the words 'damage done by the ship' . . . . necessarily include all expenses occasioned by misfortunes in which the ship was involved in common with the piers. Mellish L.J. . . . . seems to have thought that these words might bear the more restricted sense of injuria cum damno. . . . . If they can bear that sense, we ought to construe them so."

The opinions delivered in the House of Lords differed upon the question whether the liability imposed by the statute is limited to cases where a vessel is in charge of somebody. That is not material here. What is important is that expressions were used by some of their Lordships which support a construction of s. 74 whereby an owner would be rendered liable for damage due to accident, for which at common law no liability would have fallen upon "the ship" —to use the comprehensive term familiar, as I have already mentioned, in Admiralty practice. Lord O'Hagan said (1): "There is something comparatively tolerable in the notion that he" (the owner) "shall be responsible if accident occurs when his captain, or someone else employed by him, acting for him, and under his control, has, at least, the chance of avoiding it"; and, further, "the Legislature made the owner . . . . 'answerable,' *as* owner, and dispensed with the proof of negligence or any other proof, save of the fact of injury by the vessel, in all the cases contemplated by the Act." Lord O'Hagan also thought that, in *Dennis* v. *Tovell* (2), the owner may properly have been held liable. Lord Blackburn in one passage in his judgment suggests that, having regard to the difficulty which existed at common law in fixing liability upon a particular party, "the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or

(1) 2 App. Cas. 743, 759, 760, 769. (2) L. R. 8 Q. B. 10.

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that the person guilty of neglect was the owner's servant, or proving how the mischief happened."

If I were sure that a majority of the House of Lords had declared the concluded opinion that where negligence is disproved, liability for damages nevertheless lies upon an owner whose vessel has damaged a pier, I should of course so hold. It is not clear to me that there was such concurrence in *River Wear Commissioners* v. *Adamson.* (1) Further, upon consideration of the suggested exceptions to the generality of the enactment in s. 74, which are above mentioned, it seems to me that to give certain effect to them, express provisions devised with no little particularity must be incorporated in the Act. Yet nothing is more striking in the language of the section itself than its bare simplicity. So far as the matter is open for my consideration I am unable to see on what principle of construction amendments which involve elaborate modification of the language of a statute can by implication be read into it. I think rather that the dividing line between liability and freedom from liability, which is shown by the decision in the *Wear Commissioners* case (2) to exist, must be capable of expression in some plain and familiar word or words of limitation.

A plain mode of distinguishing between damage for which an owner is "answerable" under s. 74, and damage for which the section does not give an action against an owner, is found in the opinion delivered by Lord Cairns. The noble and learned Lord used these words: "This section . . . . proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God. . . . . It takes the owner as the person who is always discoverable by means of the register, and it declares that he shall be the person answerable; that is to say, the person who is to answer, or is to be sued for the damage done." After reading and re-reading what was said by each

(1) 2 App. Cas. 743, 759, 760, 769. (2) 2 App. Cas. 743, 751, 772.

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of the noble and learned Lords who delivered their opinions after the Lord Chancellor I am impressed by the fact that —notwithstanding other observations which I have cited— Lord Hatherley, though with extreme doubt and hesitation, concurred in " the opinion expressed " by the Lord Chancellor. Lord Blackburn, with doubt and hesitation, dissented from the view on which he had acted in *Dennis* v. *Tovell* (1) and used the words I have already cited : " Lord Justice Mellish . . . . seems to have thought that these words " (i.e., " damage done by the ship ") " might bear the more restricted sense of injuria cum damno. . . . . If they can bear that sense, we ought to construe them so ; and though I have had, and have, great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it." As I read the case, the judgment proposed by the Lord Chancellor, Lord Cairns, was based upon the same view—namely, that the damage for which, under s. 74, an owner is liable, is injuria cum damno—actionable damage.

For the reasons I have indicated, relying upon what was said by the Lord Chancellor, Lord Cairns, and concurred in, though guardedly, by Lord Hatherley and Lord Blackburn, it seems to me that upon the true construction of s. 74 the defendants are, in the circumstances, entitled to judgment.

Solicitor for the plaintiffs : *A. G. Hubbard.*

Solicitors for the defendants : *Ingledew, Sons & Brown, for Ingledew, Sons & Crawford, Swansea.*

(1) L. R. 8 Q. B. 10.

E. C. M. T.

[IN THE COURT OF APPEAL.]

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*Feb.* 2, 3.

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*Shipping—Practice—Jurisdiction—Breach of Contract—Carriage of Goods in a Ship—Shipowners domiciled in England—Discretion to retain Cause in Admiralty Division—Transfer to King's Bench Division—Consent of Presidents of respective Divisions—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 22, *sub-s. xii.*; 58, *sub-s.* 2—*R. S. C., Order* XLIX., *r.* 3.

By s. 22, sub-s. xii., of the Supreme Court of Judicature (Consolidation) Act, 1925, the Admiralty Division of the High Court has jurisdiction to hear and determine any claim relating to the carriage of goods in a ship " unless it is shown to the Court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England."

By s. 58, sub-s. 2, if a plaintiff assigns his action to a Division to which it ought not to have been assigned, the judge of that Division may direct the cause to be transferred to the Division to which it ought to have been assigned " or may retain it in the Division in which it was commenced."

The plaintiffs, as owners of cargo on board the defendants' ship, brought an action in personam in the Admiralty Division for damages for breach of the contract of carriage. The defendants were domiciled in England. On an application by them to transfer the cause to the King's Bench Division, the President held that he had a discretion to retain it in the Admiralty Division. On appeal:—

*Held*, that s. 58, sub-s. 2, did not give the Court discretion to retain a cause in respect of which the statute expressly provided that the Division had no jurisdiction, and that the action must be transferred to the King's Bench Division.

Per Atkin L.J. The note to Order XLIX., r. 3, in the Annual Practice, 1925, that the Court of Appeal cannot order a transfer without the consent of the presidents of both the Divisions from and to which the transfer is proposed to be made, does not apply to cases where the Court of Appeal has held that the one Division has no discretion to retain the cause in that Division. In such cases the transfer is made subject only to the consent of the president of the Division to which the cause is to be transferred.

APPEAL from a decision of the President (Lord Merrivale) refusing to transfer an action from the Admiralty Division to the King's Bench Division.

The plaintiffs, the owners of cargo lately laden on board the steamship *Sheaf Brook*, issued a writ in personam against the Sheaf Steam Shipping Co., Ld., for damages for breach

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of contract in and about the carriage of their goods on the *Sheaf Brook*. The defendants, being an English company domiciled in Newcastle-on-Tyne, took out a summons for an order that the writ might be set aside and the proceedings stayed, or for any other order that might seem just, on the ground that the Court had no jurisdiction to try the action. At the hearing, however, the defendants confined themselves to an application for the transfer of the action to the King's Bench Division, Commercial List. The President held that although the action was not one which came within the particular jurisdiction of the Admiralty Division it was within the jurisdiction of the High Court, and that if it appeared convenient for the action to proceed in the Division in which the writ had been issued in good faith the judge in his discretion could retain it in that Division. He thought it was convenient for the case to be tried in the Admiralty Court and refused, therefore, to order its transfer to the King's Bench Division.

The defendants appealed.

*K. S. Carpmael* for the appellants. As the defendant shipowners are domiciled in England the jurisdiction of the Admiralty Division is expressly excluded by the proviso to sub-s. xii. of s. 22 of the Supreme Court of Judicature (Consolidation) Act, 1925. [The material sections of the Act are summarized in the headnote and will be found set out more fully in the judgments of Bankes and Warrington L.JJ.] A similar proviso was contained in s. 6 of the Admiralty Court Act, 1861, which first gave the Admiralty Court jurisdiction over such a claim as the present one in the case of a foreign owned vessel; it was, and always has been, a limited jurisdiction: see *The Cargo Ex Argos*. (1) Accordingly, neither s. 22 (*b*) of the Act of 1925, which provides that the Admiralty Division shall have "any other jurisdiction formerly vested in the High Court of Admiralty," nor s. 56, sub-s. 3, which assigns to the Division "all causes and matters which if the [Judicature] Act of 1873 had not been passed

(1) (1873) L. R. 5 P. C. 134, 148.

would have been within the exclusive cognizance of . . . . the High Court of Admiralty," has any application. Sect. 58, sub-s. 2, of the Act of 1925, which provides (re-enacting s. 11, sub-s. 2, of the Judicature Act, 1875) that the Court may retain an action in the Division to which it ought not to have been assigned, relates to procedure only and does not give the Court discretion to retain an action in a Division which the statute has expressly stated shall not have jurisdiction.

*Alfred Bucknill* for the respondents. This was an action in personam, and the President, as a judge of the High Court, had jurisdiction to hear and determine it: *The Cheapside*. (1) The objection cannot go to jurisdiction, for the defendants could not have been successful in an application to set aside the writ. Transfer is a question of discretion: *Ocean Steamship Co.* v. *Anderson, Tritton, & Co.* (2) The plaintiffs made a bona fide mistake in issuing the writ in the Admiralty Division, and the case comes within the provisions of s. 58, sub-s. 2, which gives the judge a discretion either to transfer it or to " retain it in the Division in which it was commenced ": see also s. 59 to the like effect.

No reply was called for.

BANKES L.J. This appeal raises an important question, and one in which it is said that the learned President exercised his discretion in such a way that we ought not to interfere. If the matter was one in which the judge had exercised what in our opinion was a discretion vested in him—a judicial discretion—we should hesitate long before interfering with it; but in the view I take of the statute it does not seem to me that the judge had a discretion vested in him to retain this action in the Admiralty Division.

The writ was issued on December 10, 1925; the only claim was the plaintiffs' claim for damages for breach of contract and/or duty in or about the carriage of goods by sea; and there is no indication anywhere that the claim is other than an ordinary claim by a consignee against a

(1) [1904] P. 339, 343. (2) (1885) 33 W. R. 536.

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shipowner for damages for breach of contract to carry goods. Also, it is not in dispute that the defendants are the owners or part owners of the ship on which the goods were carried and that they, the defendant company, are domiciled in England. Under these circumstances the defendants objected to the jurisdiction of the Admiralty Court, and issued a summons that the action might be set aside and all proceedings stayed or that any other order might be made as seemed just. I think counsel is right in saying that he might have a difficulty in setting the action aside. Whether there is any difficulty in staying the proceedings, on the ground that they were brought in a Division in which there was no jurisdiction to deal with it, is another matter: but what Mr. Carpmael really asked for was that the action might be transferred to the King's Bench Division. The President held that he had discretion either to transfer or to retain the action, and under these circumstances he exercised the discretion in favour of retaining it.

At the time the action was brought the material statutes were the Admiralty Court Act, 1861, s. 6, the Judicature Act, 1875, and the Administration of Justice Act, 1920; but, at the time the matter came before the Court, the Supreme Court of Judicature (Consolidation) Act, 1925, had been passed, and all the material sections in the other three statutes to which I have referred have been embodied in that statute. It is more convenient, therefore, to deal with the matter in reference to the provisions in the Act of 1925, where they are all collected together. I think it is of importance to bear in mind the distinction between the provisions of that statute in reference to jurisdiction and the provisions in reference to procedure. The material sections seem to be these. Sect. 4 provides that for the more convenient dispatch of business there shall be in the High Court three Divisions—Chancery, King's Bench, and Probate, Divorce and Admiralty; that is, as it seems to me, a section dealing with procedure. The sections dealing with jurisdiction commence at s. 18. Sects. 18 to 22 all deal with jurisdiction, and s. 22 deals with

the jurisdiction of the Admiralty Division. It is in these terms: "The High Court shall, in relation to Admiralty matters, have the following jurisdiction, that is to say. . . . ." Then under heading (*a*) are a number of matters set out which are included in that jurisdiction. The material passage to consider is under the special heading (xii.), which includes in the jurisdiction: "(1.) any claim arising out of an agreement relating to the use or hire of a ship; or (2.) relating to the carriage of goods in a ship; or (3.) in tort in respect of goods carried in a ship." One or other of these matters must come within the present claim. But there is this qualification imposed upon the jurisdiction in respect of these matters: "Unless it is shown to the Court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England."

If there were nothing else in the section it seems quite clear that the case where the owner or part owner is domiciled in England is expressly excluded from the jurisdiction, defined in the section as Admiralty jurisdiction, which is conferred by statute upon the High Court. It is true that this particular sub-section (xii.) is followed by general heading (*b*): "Any other jurisdiction formerly vested in the High Court of Admiralty." But the particular jurisdiction in this matter would not have been vested in the High Court of Admiralty by reason of the Act of 1861; and therefore so far as jurisdiction is concerned it seems to me that the statute excludes from the jurisdiction of the High Court of Admiralty this particular class of case.

There are in addition a number of sections which deal not with jurisdiction but with procedure; those are sections introduced for the purpose of dealing with cases which have been assigned to some Division other than the one to which the statute directs it shall be assigned. But of course the section assigning business to a particular Division only deals with business with which that Division has jurisdiction to deal. Sect. 56 is the section which deals with the assignment of business; it assigns certain classes of business to the Chancery Division and certain classes to the King's Bench; and when

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it comes to the Probate, Divorce and Admiralty it assigns to that Division "all causes and matters which, if the Act of 1873 had not passed, would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty." That is a comprehensive description of all the matters which by statute the Division has been given jurisdiction over. Then to facilitate the conduct of business, and as a matter of procedure, there are sections directing transfers, where the case has been assigned to some Division other than the one to which the statute directs it shall be assigned, and jurisdiction is given to the Court either to transfer the matter to the proper Division or to retain it (s. 58). So far as the power of transfer is concerned it seems to me that that power would include not only matters over which the Court had jurisdiction, although as a matter of procedure they were assigned to some other Division, but also matters over which the particular Division had no jurisdiction, because to facilitate business that might be reasonable. I think it is provided that the Court shall have that jurisdiction; but when the statute provides for retaining a case, in my opinion it cannot give the Court discretion to retain a matter which the statute expressly says that Division shall have no jurisdiction to deal with.

On that ground, with great respect, I am unable to agree with the view that the President had any jurisdiction to retain a case which a litigant in defiance of the statute had assigned to his Division, but with which the statute says that he, the President, so long as he is acting as a judge of that Division, has no jurisdiction to deal. For these reasons I think the appeal must be allowed and the order asked for must be made, with the consequence that the appellants get the costs here and below.

WARRINGTON L.J. I am of the same opinion. [His Lordship stated the facts and continued:] The statutory provisions actually in force at the date the writ was issued were s. 11, sub-ss. 2 and 3, of the Judicature Act of 1875 and

s. 5 of the Administration of Justice Act, 1920, which reproduces in substance the provisions of s. 6 of the Admiralty Court Act, 1861. But, inasmuch as all those provisions are embodied in the Consolidation Act passed last year, it is convenient to refer to those provisions and not to the provisions to which I have alluded.

It seems to me of the utmost importance to remember that the objection taken by the defendants is to the jurisdiction of the Admiralty Division, and not merely an objection founded on matters of procedure. The jurisdiction of the Admiralty Division is defined by s. 22 of the Consolidation Act of 1925. [His Lordship read the material provisions of the section already set out and continued:] In this case it is shown that the owner of the ship was domiciled in England; and therefore the Admiralty jurisdiction did not extend to the claim endorsed upon this writ. After dealing with matters of jurisdiction in the earlier section, there are provisions in the Consolidation Act relating to procedure and to the assignment of matters to the several Divisions. The most important is s. 58, which deals with the commencement of actions and the selection by the plaintiff of the Division in which he will commence his action. It begins as follows: "Subject to rules of Court and to the provisions of this Act, every person by whom any cause or matter is commenced in the High Court shall assign the cause or matter to such Division as he thinks fit by marking the document by which the cause or matter is commenced with the name of that Division and giving notice thereof to the proper officer." Passing over the first three sub-sections there is this provision, sub-s. 4: "Subject to rules of Court, a person commencing any cause or matter shall not assign it to the Probate Division, unless he would have formerly been entitled to commence that cause or matter in the Court of Probate . . . . or unless the cause or matter is within the Admiralty jurisdiction of the High Court." I have shown, I think, that the claim in this case was not within the Admiralty jurisdiction; and therefore the plaintiff was prohibited by sub-s. 4, which is the proviso to the general provisions of the section, from

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commencing this case in the Admiralty Division, because it had no jurisdiction.

I go back to the general power which the plaintiff has of assigning his case to such a Division as he thinks proper. The material proviso is s. 58, sub-s. 2: "If any plaintiff . . . . assigns his cause or matter to any Division to which, according to rules of Court or the provisions of this Act, it ought not to be assigned, the Court or any judge of that Division, on being informed thereof, may, on a summary application at any stage . . . . direct the cause or matter to be transferred to the Division to which, according to those rules or provisions, it ought to have been assigned, or may retain it in the Division in which it was commenced." It is said that sub-section gives to the judge the power to retain in the Admiralty Division this case which, according to the provisions of the Act, the Admiralty Division has no jurisdiction to entertain. In my opinion that cannot be the true construction, and it must be borne in mind that this second proviso extends to a great many different matters. The expression "The Division to which it ought not to be assigned" would extend to a case of assigning an action for breach of promise of marriage to the Chancery Division, or an action for specific performance to the King's Bench Division, and other cases of that kind. In those cases the judge to whom the application for transfer comes might think proper to retain the action in the Division in which it was commenced; but in my judgment it could hardly be said that this sub-section was intended to give the judge power to retain in the Division in which it was commenced an action in regard to which another part of the Act expressly provided that that Division should have no jurisdiction. Perhaps also it is a matter for observation, as confirming that view, that the prohibition to which I have referred comes in a section after the general power of transfer. It looks as if it was intended as a further modification, and a much more stringent and prohibitive restriction, than the mere discretionary power of transfer. Whether I am right in that view or not on the construction of the section, and even

assuming that the judge had such a discretion as is contended for in this case, the fact that the action was commenced in a Division, which according to the provisions of the Act had no jurisdiction to deal with it, ought surely to be a predominating consideration in the mind of the judge exercising his discretion and ought to prevent him exercising it in any other way than by transferring the case to the Division which had jurisdiction. Therefore I think the order of the President was wrong; and the appeal ought to be allowed.

ATKIN L.J. I agree. This case is in respect of a claim for damages for breach of contract for the carriage of goods by sea; and it appears to me to come precisely within the exception to the jurisdiction given to the Court of Admiralty in the Act of 1861 (s. 6): "Jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods by the negligence or misconduct of . . . . the owner, master, or crew of the ship unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales." That definition of the jurisdiction with the exception was re-stated, and only re-stated, in the Administration of Justice Act, 1920, s. 5, which provided that Admiralty jurisdiction should extend to the carriage of any goods in a ship, and in proviso (1.) which repeated the restriction in the case of the English domicil of the owner or part-owner.

It seems to me material that until the Act of 1861 the Admiralty Court had not in fact jurisdiction over a claim of this kind. I think that appears from the nature of the section itself; and if authority is required it is to be found in *The Ironsides* (1), which was the first case decided after the Act and arose in respect of damage to goods by fire, the fire having happened before the passing of the Act. The question was as to whether or not, the goods having been transferred to a different ship from that in which the fire took place and

(1) (1862) Lush. 458, 466.

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carried in the substituted ship to England, proceedings in rem could be taken against the original ship. Dr. Lushington held that they could not, because it was not the ship which brought the goods, and he states: "Antecedently to the passing of the statute, this Court could not have exercised any jurisdiction at all in a case of this kind." That remedy was wholly unavailable. It appears to me that that is ample authority for the proposition that there would be no jurisdiction in the Court of Admiralty for a case of this kind.

The position seems to be this. There is a practical prohibition against the plaintiff commencing such an action as this in the Admiralty Division where the defendant is domiciled in England; and this action therefore was brought in violation of this express prohibition. I think, if one is dealing with the jurisdiction of the Division, it is plain that the statute has laid it down in terms that such actions are not to be tried in the Admiralty Division because the defendant is domiciled in this country and has got the right to have his liabilities determined by the ordinary tribunals, that is to say, by a common law action for breach of contract or for tort. Under these circumstances in my opinion the procedure section must be read in one of the two ways that have been suggested in the judgments already delivered. Either there is no discretion at all to retain such an action in the Admiralty Division, or, if the terms of the section are wide enough to give the discretion, it is a discretion which could only be exercised by making the transfer, because it would not be a judicial exercise of discretion to retain in a Division a case which the Act says ought not to be tried in that Division. There are no special circumstances. It is an ordinary case of damages for non-delivery of cargo, such as is tried every day in the Commercial Court, where there are precisely the same facilities as are suggested by the President as giving a balance of convenience to the Admiralty Court. I think, therefore, the appeal should be allowed, and the order should be made for the transfer, subject of course to the consent of the president of the King's Bench Division, which is a matter of form.

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I will only add this. There is a note to Order XLIX., r. 3, in the Annual Practice, to the effect that, when the Court of Appeal is called upon to make a transfer, the consent must be obtained, not only of the president of the Division to which the case is transferred but also of the president of the Division from which it is to be transferred. That is not in accordance with the rule. I can hardly believe that the Court of Appeal can have laid down such a general rule of law; and it does not seem to me to be applicable in a case of this kind in which we say the discretion should be exercised in one particular way.

*Carpmael.* In *Baerlein* v. *Chartered Mercantile Bank* (1) Lindley L.J. said: "Of course the consents of the presidents of the two Divisions will have to be obtained in the usual way."

BANKES L.J. We have decided that in the one Division the judge has no jurisdiction; and therefore that statement would not have effect here. The order will be made subject to the consent of the president of the King's Bench Division.

*Appeal allowed.*

Solicitors for the appellants: *Downing, Middleton & Lewis, for Downing & Handcock, Cardiff.*

Solicitors for the respondents: *Waltons & Co.*

(1) [1895] 2 Ch. 488, 493.

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*Jan.* 15;
*Feb.* 9.

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## THE MODICA.

*Shipping—Practice—Costs—Collision—Vessels to blame in unequal Degrees —Division of Costs—Discretion.*

Although it has been the practice since the Maritime Conventions Act, 1911, to make no order as to costs in collision cases in which both vessels have been held to blame in unequal degrees, the Court must be guided by the circumstances in each case. In a proper case it will feel itself at liberty to give to the party which is held to blame in the smaller degree such a proportion of that party's costs as on the particular facts appears just.

Authorities on the question of costs in " both to blame " cases reviewed.

Action of Damage by Collision. Argument on the question of costs. (1)

The plaintiffs were the owners of the steamship *George M. Embiricos;* the defendants were the owners of the steamship *Modica.* The collision took place in the Indio Channel of the River Plate on July 20, 1924. Both vessels were proceeding up the channel more or less side by side, and each alleged that the other was the overtaking vessel, and consequently had the duty of keeping out of the way. Hill J. found that the *Embiricos* still had the duty of the overtaking vessel, but that the *Modica,* which accordingly had the duty of keeping her course and her speed, made several changes of speed. He therefore held the *Embiricos* two-thirds and the *Modica* one-third to blame, and at the defendants' request reserved the question of costs for argument.

*Dunlop K.C.* and *E. A. Digby* for the defendants. Costs are in the discretion of the judge, and in the present case should be apportioned in the same ratio as the damages were apportioned. In *The Rosalia* (2), the first case decided

(1) Note.—The defendants appealed from the decision holding their vessel partly to blame. The question of the apportionment of costs was not raised or argued on the appeal. On March 24, 1926, the Court of Appeal (Bankes, Warrington and Atkin L.JJ.) allowed the appeal and held the *George M. Embiricos* alone to blame. Judgment accordingly was entered for the defendants with costs in both Courts.

(2) [1912] P. 109.

after the Maritime Conventions Act came into force, Bargrave Deane J. made no order as to costs "as best meeting the justice of the case." Before that Act, when there was no apportionment of the degree of fault, in "both to blame" cases the practice was to make no order as to costs "as a matter of discipline," so that neither party should benefit by the litigation: see the observations of Bowen L.J. in *The Hector*. (1) At a still earlier period the practice had apparently been to add together the damages, costs, and expenses of both parties and to divide them equally: see *The Washington*. (2) Since the Maritime Conventions Act, when vessels can be held to blame in unequal degrees, one blameworthy party—as in the present case—can gain by the litigation, so the question of discipline does not arise. In *The Bravo* (3) Sir Samuel Evans appeared to be very nearly laying down a general rule that there should be no costs on either side in these cases, and since that decision the question has not been argued. The only issues of fact in the present case were decided in favour of the defendants.

*Langton K.C.* and *Lewis Noad* for the plaintiffs. It is not denied that the Court has complete discretion as to costs, and if *The Bravo* (3) lays down a rule (although the President said he was not laying down any strict rule) it is not binding. *The Rosalia* (4) throws no light on the question; the decision was founded on no principle and there was no argument. It has, however, been a well established practice to make no order as to costs in both to blame cases, in whatever degrees the blame was apportioned, and in *The Bravo* (3) it was pointed out that the costs are incurred whatever the degree of blame. The issue is whether each ship is navigated properly or improperly. In the present case the question as to which was the overtaking vessel was not the only substantial issue; there was an equally important issue—namely, was the defendants' vessel properly or improperly navigated? The plaintiffs conducted the case so as to minimize the defendants' costs by admitting statements of

(1) (1883) 8 P. D. 218.
(2) (1841) 5 Jur. 1067.
(3) (1912) 12 Asp. M. L. C. 311.
(4) [1912] P. 109.

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the defendants' witnesses. No special order, therefore, should be made as to costs.

*Dunlop K.C.* in reply. If an order is made in the defendants' favour the plaintiffs will benefit by having minimized the defendants' costs. The issue was not: which vessel was badly navigated; an issue is a fact affirmed by the one party and denied by the other; see *Quirk* v. *Thomas*. (1)

*Cur. adv. vult.*

1926. Feb. 9. HILL J. read the following judgment: The question I have to decide is whether any order should be made as to costs. At the trial I pronounced a decree of liability as follows: the *George M. Embiricos* two-thirds and the *Modica* one-third to blame. The owners of the *Modica* ask me to make an order as to the costs in their favour—so as to give them a proportion of the costs.

Since the Maritime Conventions Act, 1911, it has been the practice in cases of both to blame, in whatever degree the blame was apportioned, to make no order as to costs. As to the practice before that Act, there was a time when the costs were added to the damages and divided; at a later time it became the rule that each side should bear its own costs. That prevailed for many years, both before the Judicature Act of 1873 had made the Admiralty Court a Division of the High Court of Justice, and thenceforward to 1912. After the Maritime Conventions Act of 1911 had come into operation, the question of costs was raised in two cases where the blame was apportioned unequally, and in both each side was left to bear its own costs. In *The Rosalia* (2), Bargrave Deane J. said he made the order "as best meeting the justice of the case." In *The Bravo* (3) Sir Samuel Evans was careful to say that he was not laying down any strict rule. But, after those cases, the practice seems to have become settled, and as a matter of routine upon every judgment of both to blame after a contest where there was no admission of blame

(1) [1916] 1 K. B. 516, 535. (2) [1912] P. 113.
(3) 12 Asp. M. L. C. 311, 314.

the judgment was drawn up without costs to either side. In my time—now covering a period of nine years—I cannot recall any case in which the question was raised; certainly there has been none in which it was argued until the present case. In *The Bravo* (1) Sir Samuel Evans came very near giving himself a general direction. He said: "I think on the whole the practice which has prevailed, of each vessel paying her own costs where both are to blame, ought to be applied to the new cases under the Maritime Conventions Act. . . . . The preparation of the case does not alter in character by reason of the degree of fault being large or small, and I think in practice it will be generally found that the best course is for me to say, apart from any special circumstances, that each delinquent vessel if she comes into Court, either to make an attack or to repel an attack, will have to bear her own costs." I presume that it was because of these words that the question was not again raised.

On the argument in the present case it was admitted by Mr. Langton that there was no binding rule. But I should hesitate to depart from an established practice even to the extent of considering the question of apportioning the costs without examining its origin and basis. It will, I think, be useful to consider how the practice before 1911 came into existence, and the reason of it, and to consider whether it applies in its full force to the case where, since 1911, blame is apportioned unequally, and also to consider whether what Sir Samuel Evans said about the preparation of the case applies to all cases. On this last point there are, in my experience, cases of both to blame in which a very small part of the preparation of the case is concerned with the matter for which one ship is found to blame, and nearly the whole of it is concerned with the matter for which the other ship is found to blame. To take an illustration, that is probably true in all cases where it is found that ship A was under a duty to keep course and speed, and that she did so, but she is held in fault in that she did not reverse her engines when the time arrived that ship B, neglecting a duty to give

(1) 12 Asp. M. L. C. 311, 314.

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way, could not by her own action alone avoid collision. In such a case it may appear upon the pleadings that ship A did nothing, and the whole controversy is whether the duty to give way was upon ship A or ship B. It is true that the preparation of the case does not alter ; ship A attacks ship B to show that it was the duty of ship B to give way, and defends herself by showing that it was not her own duty to give way, but on all this part of the case ship A succeeds both in attack and defence, and the fault in her is in a matter which appears on her pleading, and which calls for very little preparation and very little evidence. This applies with almost equal force if she pleads that she did reverse, but it is held that she did not, for still only a small part of the evidence is directed to her engine action at the last.

But apart from this reason, which influenced Sir Samuel Evans, is there anything in the rule before 1911 which ought to be a guide to the Court after 1911 to the extent of saying that in general no costs should be given when both ships are to blame in unequal degrees ? The history of the rule appears to be as follows : *Hay* v. *Le Neve* (1) is generally regarded as finally settling the Admiralty rule to be that if there is blame causing the accident on both sides, the loss is to be divided equally: see Lord Blackburn in *The Margaret* (*Cayzer* v. *Carron Co.* (2)). This conclusion was based on dicta of Lord Stowell in two cases, and upon a decision of Sir James Marriott in 1789, and was arrived at after consultation with Lord Stowell. Sir James Marriott had decreed that the whole damage and the costs of suit on both sides should be equally borne by the parties in the suit. In *Hay* v. *Le Neve* (3) Lord Gifford in the House of Lords, after dealing with the damage, said : " Then I should propose to your Lordships to find, that the appellants are not to pay interest. I do not think, in such a case as this, they ought to be called upon to pay interest upon this sum; and that the respondents and appellants ought to bear respectively their own expenses in the suit. As respects Sir James Marriott's case, the expenses

(1) (1824) 2 Shaw, Sc. App. 395. (2) (1884) 9 App. Cas. 873, 881.
(3) 2 Shaw, Sc. App. 395, 405.

were brought together and divided; it would perhaps be more equitable to say they should each pay their own expenses." I have failed to discover the order as drawn up. Lord Gifford said he would submit it on the following morning (June 16, 1824). However, in *The Washington* (1) Dr. Lushington said: "The law is, . . . . if neither are to blame, each pay their own costs; if both are to blame, the costs fall on both. . . . . I decree the damages, costs, and expenses of both parties to be thrown together, and to be equally divided, according to the precedent of *Hay* v. *Le Neve* (2) in the House of Lords." At some time or other, the practice which Lord Gifford thought the more equitable was followed instead of the practice of adding the costs together and dividing them, and in all cases of both to blame each side was left to pay its own costs. In *The City of Manchester* (3) James L.J. said that it was done to avoid the expense of apportionment. It certainly saved two taxations. As to the general rule, Brett L.J. in *The Hector* (4) said: "My own view of the case is, that the Admiralty Court, which had always exercised a very wide discretion with regard to the discipline of the seas, laid down this rule: if both vessels are to blame, neither of them shall gain by any litigation in the matter." The practice was settled, and settled with reference to a state of law in which when both ships were to blame they were equally liable for the damages.

Before *The City of Manchester* (3) and *The Hector* (4) the Admiralty Court had under the Judicature Act, 1873, become a branch of the High Court of Justice, and it had been laid down that the same principles as to costs applied as in other Divisions of the High Court, as, for instance, the rule that, in the absence of special circumstances, costs follow the event: *The Condor* (5) (see also *The Monkseaton* (6)). And it may perhaps be said that, as the law did not inquire into degrees of fault, a judgment of both to blame was in every

(1) 5 Jur. 1067.
(2) 2 Shaw, Sc. App. 395, 405.
(3) (1880) 5 P. D. 221.
(4) 8 P. D. 218, 220.
(5) (1879) 4 P. D. 115, 120.
(6) (1889) 14 P. D. 51.

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case a judgment that they were equally to blame and that "the event" was that each succeeded and failed in equal degree. At any rate the rule that the loss was divided equally remained, and was indeed enjoined by the Judicature Act, 1873, and the practice as to costs remained with it. But a rule as to costs which grew out of a particular rule as to liability in damages is not necessarily applicable in relation to a different rule as to liability. The Maritime Conventions Act, 1911, which gave effect to an international agreement, put an end to the rule that "if both vessels are to blame, neither shall gain by any litigation in the matter," and substituted the rule that if both are to blame, "the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault." It seems to me that the old rule as to costs ought not to be treated as governing the changed conditions.

We are left with the general principle that costs are in the discretion of the judge, subject to such general rules as are in force in the High Court of Justice, including the rule that, in the absence of special circumstances, costs follow the event. But what is "the event" in cross actions for damage by collision, in which each ship puts the whole blame on the other, and both are found to blame and liable to make good the damage, but in unequal degrees? Clearly, in a consolidated action the Court cannot give the plaintiff the costs of the claim, and the defendant the costs of the counterclaim, for it is a mere accident that one is made plaintiff and the other defendant. In one sense, each side succeeds and each loses. But, as in the illustration I have given, there are cases—I incline to think many cases—in which to ignore the proportions in which they respectively succeed and lose is to shut one's eyes to the real facts of the particular case and to produce a result which is inequitable.

In another and a truer sense "the event" is that one side succeeds to the extent of (say) two-thirds and the other to the extent of one-third. But again there may be cases in which to divide costs in the *same* proportions will produce results which are inequitable. For instance, in a fog collision

case, each sets out to prove that the speed was moderate, the whistle being duly sounded and the engines duly stopped, but on the story of one as pleaded there is an admission that the course was altered after the other was heard and before she was seen. The finding is excessive speed in each, and alteration of course in the one. That one will almost certainly be held the more to blame. But her peculiar fault will have appeared upon the pleadings, and the evidence on both sides will have been directed almost entirely to the question on which they are held alike to blame. Mr. Dunlop suggested in argument that perhaps the proper way was to distribute the costs according to the issues upon which the ships respectively succeed and fail. He recognized the difficulty of such a proceeding, for he did not ask me to attempt it in the present case. It cannot be done unless one can really break up the case into several issues, and unless there is some reasonable chance of allocating the costs to respective issues. And in cases in which each ship sets out to prove that all the fault was in the other, the Court cannot in general break up the issues more minutely than these: was ship A in fault—was that fault a cause of the collision? Was ship B in fault—was that fault a cause of the collision? The question, did ship A neglect a duty to keep out of the way of ship B, is not an issue by itself: it is necessarily wrapped up with the question, did ship B keep her course and speed? The issue depends on the answer to both questions, coupled with the further question: did the action or neglect of both or one of them contribute to the collision? I need not multiply instances.

The conclusion I have arrived at on the whole matter is that, in cases where each sets out to prove that the whole blame is in the other and both are held to blame in unequal degrees, the Court must be guided by the circumstances in each case. I may add that, for myself, I should not be disposed to add the costs together and divide them in certain proportions. Not only would that entail two taxations, but where one side had incurred much greater costs than the other, such a division might produce most inequitable results.

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I shall in proper cases feel myself at liberty to give to the side which is held to blame in the smaller degree such and such a proportion of that side's costs, being guided in each case by the facts and circumstances of the particular case. (1)

In the present case, the fair thing, in my opinion, is to leave each side to bear its own costs. I come to that conclusion upon the special facts of the case. It was a peculiar case in which the two ships were running more or less side by side and in close proximity for over half an hour, and finally fell together. Each said the other was the overtaking ship; I found in the *Modica's* favour that though at an earlier time she had overtaken the *Embiricos*, yet at the crucial time the *Embiricos* was overtaking her, or, rather, still under the duty of an overtaking ship. I found also that the *Embiricos* was keeping too close to the *Modica* laterally. But on the *Modica's* own case, she made several changes of speed and had the *Embiricos* in close proximity while she did so. This had to be justified or excused if possible, or it had to be shown that it did not contribute to the collision. Even if the *Embiricos* had admitted on the pleadings that she was overtaking and was too close laterally, that would not have proved that the *Embiricos* thereby caused the collision, unless the *Modica* could show that her changes were justified or did not cause the collision. Even if the *Embiricos* had so admitted, the *Modica* would have had to give substantially the same evidence as she gave—she could not have omitted any of her witnesses and they could not have omitted much of their evidence.

On the particular facts of this case I think that there should be no order as to costs, but the plaintiffs must have the costs of this further argument.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Thomas Cooper & Co.*

(1) See Note, post, p. 81.

## NOTE.

## THE ROBERT KOEPPEN.

In *The Robert Koeppen*, a damage action tried in the Admiralty Court on March 3, 4 and 5, 1926, the collision took place in a thick fog in the North Sea. The plaintiffs, the owners of the steamship *Egyptian*, in their statement of claim alleged that when the fog whistle of the defendants' steamship *Robert Koeppen* was heard on the starboard bow the *Egyptian* sounded a long blast in reply, and was about to stop the engines when the *Robert Koeppen* loomed into sight about 200 feet distant. The engines were then immediately put full speed astern. Each side alleged that their vessel was proceeding slowly and duly sounding the whistle for fog, and that the other vessel (*a*) was being navigated at an excessive speed, (*b*) failed to stop on hearing the fog whistle of the other forward of the beam, and (*c*) took improper helm action.

*C. R. Dunlop K.C.* and *Alfred Bucknill* for the plaintiffs.
*Langton K.C.* and *E. A. Digby* for the defendants.

HILL J. accepted the plaintiffs' story that the *Egyptian* was proceeding slowly and that she took no improper helm action. He held the *Robert Koeppen* to blame for excessive speed, improper helm action, and for putting her engines full speed ahead after the *Egyptian* came in sight. On the other hand, his Lordship said he could not excuse the *Egyptian* for not stopping her engines immediately on hearing the whistle of the *Robert Koeppen*. He accordingly held the *Robert Koeppen* three-fourths to blame and the *Egyptian* one-fourth to blame, and ordered the defendants to pay one-half of the plaintiffs' costs.

Solicitors for plaintiffs: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*
Solicitors for defendants: *Stokes & Stokes.*

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## THE CARLSTON AND THE BALCOMBE.

*Shipping—Practice—Preliminary Acts—Two separate Defendants—R. S. C., Order* XIX., *r.* 28.

By Order XIX., r. 28, "In actions in any Division for damage by collision between vessels, unless the Court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar . . . . a Preliminary Act, which shall be sealed up, and shall not be opened until the pleadings are completed. . . . ."

A collision took place between the steamships *C.* and *B.*, and subsequently the *C.* collided with the plaintiffs' vessel. The plaintiffs issued a writ in rem against the owners of the *C.*, and the usual preliminary acts were filed by both parties. In their defence the owners of the *C.* blamed the *B.*, and accordingly the plaintiffs added the owners of the *B.* as second defendants. Thereupon the owners of the *C.* obtained an order from the assistant registrar that the owners of the *B.* should forthwith file a preliminary act. On appeal:—

*Held*, that the only parties entitled as against the second defendants to a preliminary act were the plaintiffs, and that they would be so entitled when they had filed a preliminary act against the second defendants; that the first defendants were not entitled to require the second defendants to file a preliminary act unless they chose to become plaintiffs and issue a writ against the second defendants; and that the order must be set aside.

*Held* further, that if it were a matter of discretion, the guiding principle, that of mutuality, would be infringed by the order made by the assistant registrar, as the second defendants would be bound by a preliminary act which they had filed, and the parties at whose instance it had been filed would not be bound, as against the second defendants, by the judgment in the present action.

SUMMONS adjourned into Court.

In October, 1925, a collision took place in the Humber between the steamships *Carlston* and *Balcombe*. Subsequently —exactly how long afterwards being in controversy—the *Carlston* collided with the steamship *Coaster*. In respect of that collision the owners of the *Coaster* issued a writ in rem against the owners of the *Carlston*. Both parties filed the usual sealed preliminary acts, and the plaintiffs delivered their claim and the defendants their defence. In the defence it was alleged that the collision was caused by the negligence

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of those in charge of the *Balcombe*. Accordingly, the plaintiffs added the owners of the *Balcombe* as second defendants. Thereupon the first defendants, the owners of the *Carlston*, took out a summons and obtained an order from the assistant registrar that the second defendants should file a preliminary act.

The second defendants appealed.

*E. A. Digby* for the second defendants. Under Order XIX., r. 28, a second defendant cannot be ordered to file a preliminary act at the instance of the first defendant, at any rate when the second defendant was not the owner of one of the colliding vessels in the action in question. In respect of which collision are the owners of the *Balcombe* to file a preliminary act? If in respect of the *Carlston's* collision with the *Coaster*, the case for the *Balcombe* is that that collision took place a considerable time after the *Carlston's* collision with the *Balcombe*, and consequently, the *Balcombe*, knowing nothing of the facts as regards the *Coaster's* collision with the *Carlston*, will have to file a blank preliminary act: see as to this the observations in *El Oso*. (1) If in respect of the collision with the *Balcombe* herself, the owners of the *Carlston* have brought no action against the owners of the *Balcombe*, and if the latter are ordered to file a preliminary act in the present action in respect of that collision the first defendants will have the advantage of seeing it without there being any mutuality on their part. To obtain the right to have a preliminary act filed by the owners of the *Balcombe* the owners of the *Carlston* must make themselves plaintiffs by issuing a writ.

*R. F. Hayward* for the first defendants. Both these collisions were in a small compass, and it is a mere technicality that the first defendants have not issued a writ against the second defendants. In order to obtain complete mutuality the first defendants are quite prepared to file a preliminary act against the second defendants. Rule 28 is in very wide terms, and preliminary acts have been filed by all three parties in a number of cases.

(1) (1925) 16 Asp. M. L. C. 530.

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[THE PRESIDENT. Not by the second defendants at the instance of the first defendants.]

The plaintiffs, the owners of the *Coaster*, who could demand a preliminary act, were present at the hearing before the assistant registrar, and were satisfied with the application then made by the first defendants. The plaintiffs are not represented to-day.

THE PRESIDENT (LORD MERRIVALE). I adjourned this summons into Court because it deals with matters concerning the conduct of an action in the Admiralty jurisdiction which have from time to time given trouble to parties, and which on investigation I have found not free from technical and practical difficulty. The arguments to which I have had the advantage of listening have, I think, put me in a position to deal somewhat further with the operation of the rule in question, Order XIX., r. 28, in cases in which third parties are being sued in respect of collisions between vessels.

In this case the vessel *Carlston*, owned by the first defendants, was in collision with the *Balcombe*, owned by the second defendants. Subsequently the *Carlston* was in collision with the *Coaster*, owned by the plaintiffs. The owners of the *Coaster* brought an action against the owners of the *Carlston* in respect of the damage occasioned by that collision, and in that action all proper steps with regard to preliminary acts were taken under the Order. The owners of the *Carlston* in their defence alleged that the collision between their vessel and the *Coaster* was not due to the negligence of those in charge of the *Carlston*, but was occasioned by the negligence of those in charge of the *Balcombe*. Thereupon the plaintiffs amended their writ and included the two defendants in one action.

In these circumstances this situation arises. There is an action for damage for collision between vessels and there are two defendants; and prima facie the case comes within the ambit of the operative words of Order XIX., r. 28: "damage by collision between vessels." In respect of that collision the plaintiffs sue two defendants and have certain obligations

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under the rules towards both defendants. Whether they have fulfilled those obligations with regard to the second defendants I do not know. Apparently they think they have fulfilled them, and the second defendants at any rate are not saying anything about that matter.

Under these circumstances the first defendants have obtained an order from the assistant registrar that the second defendants shall file a preliminary act. It is the regularity or irregularity of that order which is in question. Mr. Digby, for the second defendants, contends that the first defendants are not within the meaning of the operative words of r. 28 in making a claim for a preliminary act. He points out that the first defendants are making no claim in the suit against the second defendants. That is true, but Mr. Hayward, for the first defendants, contends that it is a technicality which can be ignored. It is not a technicality, in my view. It may be tested in this way. Assuming that the second defendants file a preliminary act, the first defendants will have the advantage of seeing it at a period of time indicated in the rules. They will not have incurred at that time any necessary liability as regards the second defendants. That will depend upon what happens at the trial of the action. Not only so, but the first defendants may go to trial against the plaintiffs and will not be bound as against the second defendants by a plea of res judicata. It is true they will have had valuable guidance in the formation of a sound judgment as to whether they can venture to proceed against the second defendants; and they will have this further advantage, that the second defendants, in an action in which the first defendants are not necessarily bound, will have become prejudiced, if not bound, by having filed a document setting out the situation in respect of the controversy in terms from which it is difficult to depart. Therefore, it is not merely a technical matter. If it were I should use any ingenuity properly suggested at the bar to defeat it. The question is whether under r. 28 a defendant who is not a claimant against his co-defendant is entitled to assert the rights of a plaintiff, and in my opinion he is not so entitled.

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In my judgment, without prejudice to any question which may arise where there is a plaintiff and several defendants in respect of one collision only, the parties who in this action may claim a preliminary act as against the second defendants are the plaintiffs, and they will be so entitled when they have filed their preliminary act against the second defendants. As to the first defendants, they can issue their writ forthwith against the second defendants. Mr. Hayward says that that will involve unnecessary expense. If the first defendants prove not to have a good cause of action against the second defendants that may be so, but if they have a good cause of action they can issue their writ and thereupon, as Mr. Digby does not deny, the second defendants will have to file the best preliminary act they can, just as their opponents will have to do. The first defendants having become plaintiffs will be entitled to the advantages of a plaintiff under r. 28, and the second defendants will be subject to the obligations of a defendant.

That is to my mind the effect of r. 28, and accordingly this application succeeds. I will add that in my judgment if it were a question of discretion the principle of mutuality which I adopted after some consideration in *El Oso* (1) as the guiding principle in these matters of preliminary acts, would be infringed by the order made in this case, where one of the parties—namely, the second defendants, would be bound by a preliminary act which they had filed, and the parties at whose instance it had been filed would not be bound, as against the second defendants, by the judgment in the action. For these reasons I think that the order of the assistant registrar, as matters stand at present, must be reversed. If there is a change in the relative situation of the parties there will be no difficulty in applying the principles I have stated to the condition of things brought about by that change.

Solicitors for the first defendants: *Pritchard & Sons.*

Solicitors for the second defendants: *Thomas Cooper & Co.*

(1) 16 Asp. M. L. C. 530.

E. C. M. T.

[IN THE CONSISTORY COURT OF SOUTHWARK.]

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*March* 13.

## THE MAYOR, ALDERMEN AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF BERMONDSEY *v.* ALBERT ERNEST MORTIMER AND OTHERS.

*Ecclesiastical Law—Open Spaces Act*, 1906 (6 *Edw.* 7, *c.* 25), *ss.* 6, 11, 20—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *s.* 4—*Faculty to authorize Conversion of closed Churchyard into open Space*—"*Buildings*"—*Urinals*—*Toolshed*—*Jurisdiction* — *Games in consecrated Churchyard* — *Discretion* — *Conditions.*

A borough council petitioned the Consistory Court for a faculty to authorize, pursuant to the Open Spaces Act, 1906, the conversion of a consecrated churchyard, which had been wholly closed for interments by Order in Council, into an open space, and the laying out and maintenance of it as such. Authority was sought for laying out and maintaining a part of the churchyard as a playground for children and for the erection upon it of urinals and a small toolshed :—

*Held*, that the proposed urinals were "buildings" within the meaning of the Disused Burial Grounds Act, 1884, s. 2, and the Open Spaces Act, 1887, s. 4, and that the Court had no jurisdiction to authorize their erection.

*Held*, also, that the proposed toolshed was necessary for the laying out and maintaining of the churchyard as an open space, and was not a "building" within the meaning of the said Acts.

*Held*, also, that the facts proved justified the authorization of games in the converted churchyard, but that organized games, such as cricket and football, the laying out of tennis courts and the erection of swings and other structures should be prohibited. Faculty decreed, but not to issue out of the Diocesan Registry until the Council had made by-laws embodying the said prohibitions and prescribing the hours during which the churchyard should be open to the public, so as to prevent any nuisance to the occupants of adjoining houses, and had carried a copy thereof into the Registry for approval by the Chancellor.

ON December 9, 1925, articles of agreement were entered into in pursuance of the powers contained in the Open Spaces Act, 1906, between the Rev. Ambrose Bennett, Vicar of All Saints', Rotherhithe, of the one part and the Borough Council of Bermondsey of the other part, whereby it was agreed that, if and when a faculty should be granted by the Consistory Court of the Diocese of Southwark enabling the Council to take over, lay out and maintain the Churchyard of All Saints'

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Church, Rotherhithe, as an open space, the Vicar would convey the said churchyard to the Council, and would execute a deed for that purpose in a form exhibited to the agreement, and the Council would take over, lay out and maintain it as an open space. (1) By an Order in Council, dated November 25, 1853, the churchyard was wholly closed for burials from May 1, 1857.

A petition for a faculty was brought into the Registry on behalf of the Borough Council, which set out (inter alia) a Resolution of the Parochial Church Council of All Saints', Rotherhithe, approving the scheme subject to certain conditions accepted by the Borough Council, and which prayed the grant of a faculty authorizing the removal and re-erection of the tombstones in manner therein set out, and the laying out of the churchyard in accordance with a plan annexed to the petition. From this plan it appeared that it was intended to lay out a part of the churchyard as a children's playground, and to erect thereon certain urinals and a small wooden toolshed. The Chancellor of the Diocese directed the petition to be amended by exhibiting thereto the aforesaid articles of agreement and draft conveyance, and, this having been done, Citation issued on December 15, 1925, with Intimation that the faculty was to be moved for in Court.

An Act on Petition in opposition to the grant of the faculty was brought into the Registry on behalf of seven persons, all of whom were the owners or tenants of houses, the backs

(1) The following are the relevant provisions of the Open Spaces Act, 1906 :—

Sect. 6 : "The owner of any disused burial ground may convey the burial ground to, or grant any term of years or other limited interest therein to, or make any agreement with, any local authority for the purpose of giving the public access to the burial ground, and preserving the same as an open space accessible to the public and under the control of the local authority, and for the purpose of improving and laying out the same."

Sect. 20 : "The expression 'owner' . . . . used in relation to a burial ground, means the person in whom the freehold of the burial ground is vested whether as appurtenant or incident to any benefice or cure of souls or otherwise."

Sect. 11 : "(1.) A local authority shall not exercise any of the powers of management under this Act with reference to any consecrated burial ground unless and until they are authorised so to do by the licence or faculty of the bishop."

of which abutted upon the churchyard. The grounds alleged in opposition call for no report, as all were ultimately withdrawn at the hearing.

1926. March 13. The Petition came on for hearing before the Chancellor of the Diocese of Southwark (E. W. HANSELL, Esq.).

*L. A. Byrne* for the petitioners informed the Court that as a result of negotiations the Council had reached an agreement with the opponents on all points except as to the nature and height of the fence separating their houses from the churchyard. On this point an agreement was reached in the course of the hearing. Amongst other things the Council agreed to provide an attendant, who should be constantly on duty in the churchyard when it was open to the public.

[THE CHANCELLOR. Even though the Petition be now unopposed, you must satisfy me that the Court has jurisdiction to authorize the erection of urinals in a disused churchyard, and also that the present is a proper case in which to permit games to be played in this churchyard. (1)]

Evidence was called on behalf of the petitioners on these points. It was stated to be the experience of the Council's officers that in the absence of urinals it was difficult to prevent the commission of nuisances. All the closed churchyards in the borough except this had already been converted into open spaces, and in many instances urinals had been erected.

[THE CHANCELLOR. My difficulty arises solely by reason of the provisions of s. 3 of the Disused Burial Grounds Act, 1884, and of s. 4 of the Open Spaces Act, 1887. Evidence of what has been done elsewhere cannot assist me to construe these Acts, unless what was done was authorized by faculty,

(1) Sect. 11 (2.) of the Open Spaces Act, 1906, is as follows: "The playing of any games or sports shall not be allowed in any burial ground in or over which a local authority have acquired any estate, interest, or control under this Act, except that (*a*) in the case of a consecrated burial ground, the bishop by licence or faculty . . . . may expressly sanction any such use of the burial ground, and may specify any conditions as to the extent or nature of such use."

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and such faculties are relied on as precedents governing this case.]

The petitioners were unable to show under what authority the urinals were erected in other churchyards.

As to the playing of games, the evidence was that spaces available for games were far short of requirements in the borough, that, though Southwark Park was not far away, to reach it required the crossing of at least one main highway, and that, in any case, many parents considered their children to be subject to less risks when playing in a small ground under supervision than in a large park. The Rev. Ambrose Bennett and the Rev. Andrew Amos, Rector of Rotherhithe and Patron of the benefice of All Saints', Rotherhithe, gave evidence in favour of permitting games in the churchyard under some supervision. The latter stated that the churchyard of Rotherhithe Parish Church had been converted into an open space a few years ago, and children had since then been allowed to play in it. He found that no nuisance, inconvenience or irreverence had resulted from their so doing.

*Byrne* contended that the evidence showed an overwhelming case both for the erection of urinals in the churchyard and for the permission to play games therein. But if, on either point, the Court felt unable to permit what the petitioners prayed, he was instructed not to press either point, the Council being content to take the faculty subject to such conditions as the Court thought proper. He was however authorized to say that all the persons who had appeared in opposition to the faculty supported the erection of urinals in the position now intended.

*N. H. Moller* for the opponents.

THE CHANCELLOR [having stated that the proposed laying out of the churchyard would be of great benefit to the locality and would be eminently desirable, and that he was prepared to decree a faculty for the purpose, and having given certain directions as to the removal and re-erection of tombstones, continued :] Two questions of law remain to be considered

—namely, as to the jurisdiction of the Court to permit the erection of urinals upon a disused burial ground, and as to whether, and, if so, subject to what restrictions, the Court should permit the playing of games in this burial ground, which is a consecrated churchyard. In regard to the first question, if the matter were one for my discretion, I should have no hesitation, after hearing the evidence, in granting a faculty for the erection of the urinals in the position now proposed. But I feel compelled to hold that the Court has no discretion in the matter. Sect. 3 of the Disused Burial Grounds Act, 1884, provides that "it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship." Sect. 4 of the Open Spaces Act, 1887, enacts that the expression "building" in the former Act shall include any temporary or movable building. And further, the Court of Arches, in considering the meaning of the permitted exception under the former Act, has held that it must receive a restricted rather than an extended interpretation: *London County Council* v. *Dundas.* (1) The proposed urinals as shown on the plan annexed to the Petition are clearly "buildings," and I hold that the Court cannot sanction them. The plan also shows that it is proposed to erect a small wooden shed as a place in which to store gardeners' tools, etc. A place where such tools may be kept seems to be a necessity if the ground is to be improved and laid out as an open space as contemplated by the Act of 1906, and the Court would desire not to be extreme to mark the shed as constituting an infringement of the Act, if it can properly take that course. I think I may in this case hold that the shed as shown on the plan is not a building, and I allow it.

As to the playing of games, the Court would certainly wish to allow the children's playground in this case, if possible. [He read s. 11 of the Open Spaces Act, 1906.] I am greatly impressed with the evidence of Mr. Amos on this subject, and I think a case has been made here for permitting games

(1) [1904] P. 1.

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to be played, but subject to stringent restrictions. Organized games such as cricket or football ought not to be allowed, nor should there be any permission to erect structures such as swings or to lay out tennis courts or the like. Further, the adjoining householders, who have acted most reasonably and properly in accepting the proposals made by the Council and withdrawing their opposition, should be protected against nuisance from undue noise or otherwise. Games cannot, of course, be played at all without some noise, but between such inevitable noise and the creation of a real nuisance there is an obvious distinction. The draft rules or by-laws submitted by the Council do not at present cover either of these points. (1) Before the faculty issues out of the Registry the petitioners must file therein amended or additional by-laws to be approved by me prescribing the hours during which the ground is to be open to the public, and prohibiting organized games and such erections as swings. When this has been done, a faculty may issue. The attendant, whom the Council have agreed to provide whenever the churchyard is open to the public, must be authorized and required to enforce these by-laws.

Solicitor for petitioners : *The Town Clerk of Bermondsey.*
Solicitors for opponents : *Wingfields.*

(1) A copy of proposed regulations for the management of the burial ground had been brought into the Registry by the petitioners. Two additional by-laws were subsequently submitted to and approved by the Chancellor together with those in the original draft.

A. L.

*Applied.* SCOTT *v.* SCOTT [1951] P. 193

*Applied.* SCOTT *v.* SCOTT. [1950] 2 All E.R. 1154.

[IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION AND IN THE COURT OF APPEAL.]

1925 *Dec.* 21.

1926 *Jan.* 18, 20; *Feb.* 18.

C. A. *March* 22.

## JAGGER *v.* JAGGER.

*Divorce—Practice—Permanent Maintenance—Assignment of Property by Husband before Order made—Settlement on second Marriage—Setting aside Settlement—Powers of Court.*

On May 8, 1924, a wife obtained a decree nisi on the ground of her husband's adultery, which was made absolute on November 24, 1924. On December 22 the wife filed her petition for permanent maintenance, and on July 1, 1925, an interim order was made at the rate of 650*l.* per annum for maintenance of the wife and her child. It appeared on the inquiry as to the husband's property that he had no capital other than chattels, but he was a sculptor who had been fortunate in obtaining work in connection with certain important war memorials, the payments for which had made his income up to 2000*l.* a year. There was no prospect of his continuing to earn nearly so large an income in the future. In July, 1925, before any final order for maintenance had been made, the husband assigned most of the moneys so owing to him to trustees of a settlement upon his second marriage, which he entered into on July 23, 1925. This settlement did not attempt wholly to defeat the petitioner, for it set aside 1500*l.* to satisfy any order that might be made against him for maintenance during the following three years. On November 18, 1925, the registrar made a final order for the payment of maintenance to the petitioner at the rate of 550*l.* a year for the petitioner and 100*l.* for the child, and for security to be given by the husband for a further 150*l.* a year for life.

On cross applications by the petitioner that the security should be given for 250*l.* a year, and to admit of this being done that the settlement by the husband on his second marriage should be set aside, and by the husband that no order should be made for security:—

*Held*, by Hill J., that although the Divorce Court had power to restrain a respondent husband by injunction from parting with his own property in order to defeat the claims of the petitioning wife to alimony or permanent maintenance which the Court had already ordered, it had no power to set aside an assignment of his property made by him in consideration of a second marriage, even if the result might be to defeat the claim of the petitioner to maintenance not yet actually ordered.

*Held*, therefore, that the marriage settlement could not be set aside, but that the order of the registrar must be varied by increasing the annual payment to 700*l.* for the petitioner and by omitting the order on the husband to give security for 150*l.*

On appeal by the petitioner:—

*Held*, by the Court of Appeal, that the order of Hill J. must be affirmed, and further that it was a fatal objection to the petitioner's application

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to set aside the settlement that neither the trustees nor the second wife were before the Court.

*Newton* v. *Newton* (1885) 11 P. D. 11 and *Burmester* v. *Burmester* [1913] P. 76 followed.

ON May 8, 1924, a decree nisi for a divorce was made against the husband, on the wife's petition, for adultery. The husband had paid his wife 400*l.* for alimony pendente lite. The decree was made absolute on November 24, 1924. On December 2, 1924, the wife presented a petition for permanent maintenance in which she alleged that her late husband carried on business as a sculptor and was in receipt of an income of 2000*l.* a year.

It appeared that the husband had been successful in securing orders for several war memorials of considerable importance, including the memorial at Hyde Park Corner, and that the profits made out of these during the three years ending October, 1925, did amount to about 2000*l.* a year. But there was no prospect of his making anything like so large an income in the future after these memorials were finished, and, indeed, no very certain prospect of any income at all.

On these figures an interim order for maintenance of the wife was made at 650*l.* a year, on July 1, 1925.

On July 25, 1925, the respondent married a Miss Wade. Before this marriage he assigned all the moneys due to him in respect of the war memorials to trustees upon trust to pay expenses, set apart 1500*l.* to meet the petitioner's claim for alimony, and to hold the residue in trust for his new wife.

The matter came again before the registrar on November 18, 1925, and the registrar then ignored the settlement and ordered the husband to pay the petitioner permanent alimony at the rate of 550*l.* a year and 100*l.* for their child, and to secure to her 150*l.* a year for life.

The petitioner then gave notice of motion for December 1, 1925, to extend the time for appealing from the registrar's order of November 18, and to vary the amount secured by increasing it to 250*l.* And the respondent also gave notice

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of motion to extend the time for appealing and to strike out the direction to settle 150*l.* altogether.

*W. O. Willis K.C.* and *H. B. D. Grazebrook* for the petitioner. The existence of a petition for maintenance, though after decree absolute, is a continuance of the lis pendens, and the husband cannot dispose of his property while the lis pendens is in existence or the statute would be stultified. *Newton* v. *Newton* (1) may appear to be against the petitioner, but it concerns only alimony pendente lite and is therefore distinguishable.

[HILL J. Can the respondent be restrained from parting with his property without an order for maintenance having been made ?]

*W. O. Willis K.C.* referred to *Newton* v. *Newton* (2) and *Sidney* v. *Sidney*. (3) *Burmester* v. *Burmester* (4) is distinguishable. In that case there was no subsisting order and no decree absolute. At all events the petitioner is entitled to the security recommended by the registrar, even if it cannot be extended.

[HILL J. Can security be ordered merely on income ?]

There is money in hand which can be settled : *Twentyman* v. *Twentyman*. (5) The respondent for the purposes of an order should be treated as still possessing the property which he has purported to assign : *Brown* v. *Brown* (6) ; *Bellamy* v. *Sabine*. (7)

[They also referred to *Loraine* v. *Loraine* (8) and *Constantinidi* v. *Constantinidi*. (9)]

*Cotes-Preedy K.C.* and *P. B. Morle* for the respondent. The respondent has always been willing to pay and has paid what the Court has ordered. But the Court has no power to deal with any settlements except those between parties whose marriage is the subject of a decree for dissolution. There is no jurisdiction to affect the interests of the second wife. But

(1) [1896] P. 36.
(2) 11 P. D. 11.
(3) (1867) 17 L. T. 9.
(4) [1913] P. 76.
(5) [1903] P. 82.
(6) (1828) 2 Hagg. Ecc. 5.
(7) (1857) 1 De G. & J. 566, 578.
(8) [1912] P. 222.
(9) [1904] P. 306 ; [1905] P. 253.

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if there was jurisdiction the second wife would have a right to be heard, and she is not made a party. It is quite too late to interfere with the settlement.

*W. O. Willis K.C.* in reply.

*Cur. adv. vult.*

1926. Feb. 18. HILL J. [after stating the facts :] I am unable to find any power in the Court to vary or set aside an assignment made in the circumstances of this case, even though its effect be entirely to prevent a wife making good a claim for security. I was not referred to any statute which gives the Court that power, nor to any case which shows that such a power is inherent to the Court.

The cases cited mainly turned on the question whether an injunction can be granted to restrain the husband parting with property in such a way as to defeat a wife's claim to alimony pendente lite or permanent maintenance ; and the effect of those cases is that an injunction can be granted after an order for alimony or maintenance and cannot be granted before order made. That I take to be the effect of *Newton* v. *Newton* (1) ; *Newton* v. *Newton* (2) ; *Twentyman* v. *Twentyman* (3) ; and *Burmester* v. *Burmester* (4) ; and among older cases, *Sidney* v. *Sidney*. (5) If and so far as *Noakes* v. *Noakes* (6) is to the contrary, Sir James Hannen in *Newton* v. *Newton* (1) himself treated it as no authority. I fail to see how these cases are any authority for saying that where a husband has parted with his property the transaction can be set aside.

Upon the making of the interim order on July 1, 1925, I think an injunction might have been granted, but none was applied for, and on July 23, 1925, the property was assigned and the power of the Court to act by injunction was gone.

Counsel for the petitioner referred me to the general principle that property the subject of a lis pendens cannot be dealt

(1) 11 P. D. 11.
(2) [1896] P. 36.
(3) [1903] P. 82.
(4) [1913] P. 76.
(5) (1867) 17 L. T. 9.
(6) (1877) 4 P. D. 60.

with while the lis is pendens. He cited *Bellamy* v. *Sabine* (1); *Loraine* v. *Loraine* (2); and *Constantinidi* v. *Constantinidi*. (3) But in a petition for maintenance there is no dispute as to the rights to the property of the husband. In *Loraine* v. *Loraine* (2) and *Constantinidi* v. *Constantinidi* (3) the lis pendens related to the property settled. This principle seems to me not to touch the matter now in question.

I was referred also to *Brown* v. *Brown*. (4) All it decides is that if a husband with the object of avoiding an order for alimony pendente lite divests himself of all his property, an order may be made as if the property were still his. And I can well suppose that if the husband against whom an order for payment has been made based upon his income in 1922–3–4, should in some later years apply to reduce the amount on the ground that he received no income in 1925–6, he will not be allowed to say that, if in 1925 he voluntarily assigned his prospective income for those years; it may well be that he will be treated as having received that income. But this does not help me to say that this assignment can be set aside.

I have further considered whether I can treat the assignment as within the statute of Elizabeth (13 Eliz. c. 5), and in this connection I have considered the cases of *Blenkinsopp* v. *Blenkinsopp* (5) and *Bulmer* v. *Hunter*. (6) I have considered these cases with the more care because in *Blenkinsopp* v. *Blenkinsopp* (5) the assignment appears to have been made before any order for alimony (though the decision is not so treated in *In re Barned's Banking Co.* (7)). But in *Blenkinsopp* v. *Blenkinsopp* (5) the assignment was voluntary. In the present case it was in consideration of the second marriage. And in *Bulmer* v. *Hunter* (6), though there was a second marriage and the assignment was expressed to be in consideration of it, yet it was found that both the marriage, which was between parties who had been living together as

(1) 1 De G. & J. 566, 578.
(2) [1912] P. 222.
(3) [1904] P. 306; [1905] P. 253.
(4) 2 Hagg. Ecc. 5.
(5) (1849) 12 Beav. 568; (1852) 1 D. M. & G. 495.
(6) (1869) L. R. 8 Eq. 46.
(7) (1867) L. R. 2 Ch. 171, 176.

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husband and wife for a long period, and the assignment were with the object of defeating creditors. "A marriage got up with the object of defrauding a man's creditors, where the intended wife is a party to the fraud, will not be supported; the wife was implicated in the matter, and the Court will not allow such an attempt at fraud to prevail." There is no pretence for saying in the present case that the second marriage was other than genuine and with no ulterior motive.

I cannot set the assignment aside.

Unless the assignment is set aside, it is not suggested that the husband has any property whereby payment can be secured. I therefore think that upon the point in issue before me the wife fails and the husband succeeds. I vary the order by ordering an annual payment of 700*l.* for the wife and 100*l.* for the child and omitting the order for the security of 150*l.* I should add in the husband's favour that the assignment does not show an intention to defeat the wife altogether —for 1500*l.* is set aside for fulfilment of his obligations to the wife during the ensuing three years.

I wish it to be clearly understood that my decision in this case does not apply where the assignment is voluntary, i.e., voluntary on the face of it, or expressed to be for a consideration which is found to be a sham.

J. R. B.

The wife appealed. The appeal was heard on March 22, 1926.

*W. O. Willis K.C.* and *H. B. D. Grazebrook* for the appellant repeated the arguments used by them in the Court below.

*Cotes-Preedy K.C.* and *P. B. Morle* for the respondent were not called upon.

LORD HANWORTH M.R. We have had this matter very fully argued before us by Mr. Willis on behalf of the wife, but we are satisfied that the judgment of Hill J. was right and that this appeal must be dismissed.

It is material in this case to bear in mind certain dates. The petition was presented by the wife for divorce on the

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Lord Hanworth M.R.

ground of her husband's adultery. On May 8, 1924, she obtained a decree nisi, which was made absolute on November 24, 1924. There was one child of the marriage. On December 1 the wife filed her petition for permanent maintenance. Negotiations then took place with a view of fixing the amount of the maintenance to be paid by the husband. These negotiations having failed the husband filed his affidavit in answer to the petition in which he alleged that his average gross income was 2412*l.* a year approximately. On July 1, 1925, an order was made by the registrar that the husband should pay for the wife and the child of the marriage interim maintenance at the rate of 650*l.* per annum, payable monthly, until the actual amount of the maintenance should be fixed. On the same date an order was made by the registrar requiring the husband to make a further affidavit as to his means. On July 22, 1925, the husband having obtained an extension of time filed his further affidavit. In that affidavit he referred to his former affidavit as to his means and stated that he did not keep any books except pass books or any accounts ; that taking a three years' average for the three years ending April, 1925, his income had averaged approximately 2000*l.* ; and that not having kept any books he was unable to give further details. That affidavit, as I have said, was dated July 22, 1925, and Mr. Willis attaches significance to that date, because on the following day, July 23, the husband executed a marriage settlement by which he settled practically the whole of his property in favour of a lady whom he subsequently married, and also executed a trust deed under which he set aside a sum of 1500*l.* to satisfy any order that might be made against him for maintenance during the ensuing three years.

It was said by Mr. Willis that the joint effect of this settlement and trust deed was to dispose of practically the whole of the property that the husband possessed and thereby to defeat any order for maintenance that might be made against him. He was a sculptor, and was carrying out contracts for the erection of a war memorial in London and also one in Egypt, the payments for which had made his income up to

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2000*l.* a year. On November 23, 1925, an order was made by the registrar (1.) that the husband should pay to the wife until further order from the date of the final decree maintenance at the rate of 550*l.* per annum (credit to be given for any sum already paid); (2.) that he should secure to the wife for her life the further yearly sum of 150*l.*; (3.) that he should pay to the wife the sum of 100*l.* per annum until further order for the maintenance of the child of the marriage; and (4.) that all such payments should be by equal monthly instalments. From this order both the wife and the husband appealed. Though the payment of the 700*l.* a year was not objected to by either party they both objected to the order for security. The wife asked that the order should be varied by directing that the 150*l.* a year ordered to be secured should be increased to 250*l.* and that the settlement of July 23, 1925, should be set aside so far as was necessary to enable that sum to be secured. The husband on the other hand asked that the order should be varied by striking out that part of it which directed that he should give security for 150*l.* a year on the ground that he was without means. Hill J., in a considered judgment, ordered that the total amount of the maintenance should stand at 700*l.*, but that as the husband was without means and therefore unable to give security, that part of the order which required him to give security for 150*l.* a year should be omitted, and he made no order as to setting aside the settlement. From that judgment the present appeal is brought.

It was contended by Mr. Willis on behalf of the wife that the husband had by his voluntary act put it out of his power to give security for the maintenance of his former wife by disposing of all his property, and that that was a fraud on her. It was further contended that he had so acted at a time when the matter was before the Court as to prevent his being able to comply with any order that the Court might make, and that such conduct on his part was contumacious.

Hill J. has given a carefully considered judgment in which he has dealt with the authorities, and I do not desire to do more than to say that I agree with his judgment.

It must be remembered that a litigant is not entitled as of right to have his rights safeguarded before an order has been actually made on the principle of quia timet, and there is no disciplinary or statutory power in the Court to prevent a respondent to a petition from doing what he likes with his property before an order for maintenance has been made.

Sir James Hannen dealt with the matter in *Newton* v. *Newton*. (1) In that case it was held that the Court would not, in order to protect a wife's right to alimony, restrain a husband from removing his property out of the jurisdiction of the Court before an order for alimony had been made. Sir James Hannen, after referring to *Sidney* v. *Sidney* (2) and *Noakes* v. *Noakes* (3) and pointing out that in the former case there was, as there was not in the case before him, a subsisting order for the payment of the annuity, said (4): "No other authority having been cited, and as I have myself been unable to find any other authority in support of the proposition advanced on the part of the petitioner, I come to the conclusion that as it has been decided that the Judicature Act does not give any enlarged powers to the Court in this respect, it is not competent for a Court, merely quia timet, to restrain a respondent from dealing with his property." He accordingly dissolved the injunction that had been granted in that case.

Those cases have recently been considered in *Burmester* v. *Burmester* (5), and it was there held that the Court, upon a petition for permanent maintenance, and before any specific sum had been made payable by a subsisting order, had no power to grant an injunction, at the instance of a wife, restraining her husband from dealing with his property which might ultimately be affected under a petition for permanent maintenance; and that the same principle applied to an application for permanent alimony. In that case Sir Samuel Evans dealt with *Newton* v. *Newton* (1) and held himself bound by it. In the present case no application was made

(1) 11 P. D. 11.
(2) 17 L. T. 9.
(3) 4 P. D. 60.
(4) 11 P. D. 11, 13.
(5) [1913] P. 76.

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by the wife for an injunction at the time she applied for the interim order for maintenance.

It is clear, therefore, on the authority of *Newton* v. *Newton* (1) and *Burmester* v. *Burmester* (2) that no order can be made in respect of the action of the husband in dealing with his property four months before the order made by the registrar for permanent maintenance.

It is of importance to observe that the present case comes before us on appeal from the Probate and Divorce Division, and I do not overlook the possibility of a very different position if the matter came before the Court in bankruptcy, by reason of the failure of the husband to pay any of the instalments due to the petitioner.

For these reasons I think that the order of Hill J. was right and that this appeal must be dismissed with costs.

SCRUTTON L.J. I agree. I am not aware of any statutory or other power in the Court to restrain a person from dealing with his property at a time when no order against him has been made. There was here an application by the husband to relieve him from the order to give security and also an application by the wife to have the settlement of July 23, 1925, set aside so far as was necessary to enable the husband to comply with the order to give security. It seems to me to be a perfectly fatal objection to the wife's application that neither the trustees of nor the beneficiaries under the settlement, who would be interested in objecting to the settlement being set aside, are before the Court.

SARGANT L.J. I also agree, and in addition to the reasons given by Hill J., I should like to emphasize my agreement with the last part of the judgment of Scrutton L.J. It seems to me quite impossible when you have, as here, a marriage settlement under which the second wife and possible children are beneficiaries, that any order can be made affecting the settlement except in proceedings to which the wife and the trustees are parties. Any such application as that in the

(1) 11 P. D. 11. (2) [1913] P. 76.

present case would have to be by way of substantive action in which all the parties interested under the settlement were before the Court. The appeal therefore must be dismissed.

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*Appeal dismissed.*

Solicitors for wife: *Bartlett & Gregory.*
Solicitors for husband: *Boyce, Evans & Co.*

W. I. C.

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ADMIRALTY.

1926 *March* 8, 10.

## THE GOLAA.

*Shipping—Action in rem in America—Bail—Subsequent Action and arrest of Ship in England—Discontinuance of American Action—Writ in second Action set aside.*

In January, 1924, the plaintiffs instituted an action in rem in the United States in respect of damage done by the defendants' ship to some pipe lines belonging to the plaintiffs in the bed of the river at Tampico. The ship was arrested and released on bail being given by the defendants in the sum of $28,000. The action proceeded in America, but on February 26, 1926, before it had been brought to trial, the plaintiffs issued a fresh writ in rem in this country, and on the 27th re-arrested the ship in the Thames. Later on the same day the plaintiffs' representative here cabled for the American proceedings to be discontinued. On March 4 the defendants served notice of motion to set aside the writ and all subsequent proceedings in the present action. On March 8 the American action was discontinued:—

*Held*, that having obtained bail and so released the ship from any further claim in respect of the particular damage alleged, the plaintiffs' subsequent discontinuance of the action in America after the re-arrest here did not cure their breach of good faith in instituting proceedings in England and causing the ship to be arrested again; and that the writ and all subsequent proceedings must be set aside.

MOTION to set aside a writ and all subsequent proceedings.

The defendants, the owners of the Norwegian steamship *Golaa*, moved to set aside a writ in rem issued by the plaintiffs, the Compania Mexicana-Holandesa La Corona S.A. for damage alleged to have been done in November, 1923, by the *Golaa* fouling their water-pipe lines and telephone cables crossing the Panuco River at Tampico, Mexico.

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The facts are summarized in the headnote and more fully stated in the judgment.

*E. A. Digby* for the defendants. When the defendants gave bail in America they purchased the freedom of their ship, and even if the American action be discontinued and the plaintiffs issue a fresh writ here they cannot re-arrest the ship. This case, where the facts are even stronger, is covered by the decision in *The Christiansborg* (1): see also *The Mannheim*. (2)

[He was stopped.]

*Langton K.C.* and *L. F. C. Darby* for the plaintiffs. The principle underlying *The Christiansborg* (1) and *The Mannheim* (2) is that the Court will set aside the fresh proceedings if there is something harassing to the defendants in them. In this case the defendants cannot show vexatious conduct on the part of the plaintiffs, who by discontinuing the American proceedings have burnt their boats and will be without a remedy. It cannot be said that once bail is given the ship is never subject to arrest again. The observations in *The Christiansborg* (3) and *The Mannheim* (2) on the question of bail are obiter, as no bail was in fact given in either case. Lord Esher, in his dissenting judgment in *The Christiansborg* (3), said that the Court would be exercising its jurisdiction with extreme rashness if upon the mere fact that bail is given they were to prevent a man from giving up that bail, from paying the costs of the foreign action, and from going on with his action in this country. The fact that an action is pending elsewhere—and there is now no action pending elsewhere—is not enough of itself to warrant the second proceedings being set aside: *Peruvian Guano Co.* v. *Bockwoldt*. (4) In stopping an action the Court must be careful not to do an injustice. The plaintiffs may have a better chance of success in law in this country.

[Reference was also made to *The Hagen*. (5)]

(1) (1885) 10 P. D. 141.
(2) [1897] P. 13.
(3) 10 P. D. 141, 151.
(4) (1883) 23 Ch. D. 225.
(5) [1908] P. 189, 202.

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BATESON J. In November, 1923, the *Golaa* did some damage at Tampico to a pipe line belonging to the plaintiffs. Before any arrest of the vessel in America Messrs. W. K. Webster, the well-known firm who act for foreign underwriters, on behalf of the defendants offered their undertaking through the defendants' solicitors to the plaintiffs' representatives in this country. I should have thought Messrs. Websters' undertaking would have been quite sufficient and would have been accepted. The plaintiffs' representatives, however, having no authority to accept an undertaking only, declined it. The ship was in fact arrested in the United States of America on January 16, 1924—over two years ago—and bail to the amount of $28,000 was provided by the defendants to meet the claim and secure the release of the ship. The case accordingly proceeded in the District Court of Pennsylvania, but to what extent I do not know, because all that I have seen is a copy of the actual libel in the proceedings. The *Golaa* has been to this country at least twice since that time and possibly oftener. On February 26, 1926, the writ in the present action was issued, and on the following day the ship was arrested at Thames Haven.

The defendants now move to set aside the writ on the ground that they have already given bail in America to satisfy the claim. The question is whether I ought to set aside the writ in accordance with the decisions in *The Christiansborg* (1) and *The Mannheim*. (2) In a case in which bail has been given in one country, thereby releasing the ship herself from any further claim in respect of the same damage—the bail being substituted for the ship—I consider that it is contrary to good faith to pursue the ship in another country and re-arrest her for no reason at all that has been put before me. No suggestion has been made that the case cannot be tried just as well in America, except the fact that the Norwegian shipowners are nearer to this country than they are to America. The case has been going on in America for two years. The ship has been trading and is now under arrest

(1) 10 P. D. 141. (2) [1897] P. 13.

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in the Thames. I do not know whether it is so, but it may be most inconvenient for the defendants to find a similar amount of bail—$28,000 is over 5000*l.*—for the second time. I think that is most oppressive and vexatious. It is true that on February 27 last the plaintiffs' solicitors informed the plaintiffs' representative here that the vessel had been arrested, and they advised him to cable to America to discontinue the proceedings there. He reported to his office and gave instructions for the despatch of a cable to discontinue "all proceedings at your end," i.e., in America. That was sent off at 1.25 P.M. on the 27th. But the first intimation of the discontinuance of the action was when the plaintiffs' affidavit was handed to the defendants two days ago, on March 8. I do not think the discontinuance matters. The action had not been discontinued in America when the writ was issued and the ship arrested here, and I do not think the discontinuance cures the unfairness or want of good faith in seizing the ship here, whether it happened an hour or a day or two afterwards. The fact remains that bail is demanded in both places.

Mr. Langton says that no case like this has ever been reported. I think there may be a very good reason for that: nobody has ever attempted to try to do what the plaintiffs are doing in this case—getting bail in one country, keeping that bail, and then re-arresting the ship and asking for the same bail again. The plainer the case the less authority one is likely to find. Mr. Langton relied on *Peruvian Guano Co.* v. *Bockwoldt* (1) and contended that the present case is not like either *The Christiansborg* (2) or *The Mannheim* (3), because there was no bail in those cases. He argued that the expressions in the judgments on the question of bail were really obiter, and he also relied on the dissenting judgment of Lord Esher in *The Christiansborg*. (2) The *Peruvian Guano* case (1) did not turn at all on a question of bail, but on whether two actions should go on at the same time, one in a foreign country and one in this country. In the one

(1) 23 Ch. D. 225.

(2) 10 P. D. 141.

(3) [1897] P. 13.

action six ships or cargoes were involved and in the other seven cargoes. The Court of Appeal held that there was no reason why the two actions should not proceed at the same time because different remedies were available. In the present case it is a question of double bail, which I think makes a considerable difference. *The Christiansborg* (1) is more like this case, because there, in effect, it was held that the guarantee which had been given was equivalent to bail. Sir James Hannen (as he then was) says: "By that release" —that is after the guarantee which released the ship had been given—"it was plainly meant, that the vessel was to continue on her voyage and be useful in any part of the world to her owners, and not merely that she was at liberty to navigate Dutch waters. But the plaintiffs, by commencing an action here and arresting this vessel here, have set at naught this theory, though they have in Holland a security according to the law of that country and satisfactory to the plaintiffs' agents in that country. The plaintiffs seem to think that they may arrest this ship wherever they find her, and so defeat the object of giving bail in Holland. It appears to me, therefore, that justice requires that both suits instituted in this country should be stayed, and that the vessel should be released." I think that is the reason for Sir James Hannen's decision. It commends itself to me, and I think it is followed out in all the judgments in the Court of Appeal. Lord Esher says: "I think it would be vexatious in fact to call upon the owner of the ship in respect of the same cause of action to give bail in the two Courts at the same time. . . . . But the present case is stronger, for either the proceedings in Holland are shewn to be different from those in the English Admiralty Court, and the plaintiffs will have no chance or possibility of obtaining judgment with effect in Holland; or, on the other hand, the proceedings in Holland are the same as those here. Then it is clear that after the release of the ship upon the guarantee between the parties an English Court of Admiralty would not try the case." (2) The judgments of Baggallay and Fry L.JJ. seem to me equally

(1) 10 P. D. 141, 144.

(2) 10 P. D. 141, 151.

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fatal to Mr. Langton's argument. (1) In *The Mannheim* (2) Gorell Barnes J. puts it quite shortly: "It is therefore said that if bail is put in in the suit, you have, by doing that, procured and purchased the release of your ship, so that she cannot be arrested again."

It is suggested that if the plaintiffs pay the costs in the American proceedings there is nothing oppressive or vexatious in bringing an action here. But when one looks at the affidavit that has been put in as to what has taken place in America it appears that the total amount of the taxed costs is only $333 71 cents. Those, of course, are only the taxable Court costs. What the actual costs are that have been incurred by the defendants I do not know. The proceedings have been going on for two years, and I suspect that the costs are very considerably more than that. The plaintiffs, by their counsel in the course of the hearing, made an offer to abide by any order I should make as to the costs in America. Mr. Digby, however, pointed out the difficulty there would be in ascertaining what those costs might be, and that it was difficult to discover whether there was any means of taxing them in this country so as to protect the defendants against all the costs thrown away—solicitor and client costs. I suggested that I should tax the bill to the best of my ability, but there seemed to be grave difficulties in the way of that being done, and I was not surprised that Mr. Digby declined the suggestion. The case is now started here two years after the event, when the defendants may not know where their witnesses are, or what difficulties they may be in after such a lapse of time.

I think it would be most improper to allow this writ to stand, and I set it and all subsequent proceedings aside with costs.

Solicitors for the plaintiffs: *Waltons & Co.*

Solicitors for the defendants: *Thomas Cooper & Co.*

(1) 10 P. D. 141, 151.

(2) [1897] P. 13, 17.

E. C. M. T.

PROBATE.

1926
*March* 24.

## *In re* HERBERT (DECEASED).

*Probate—Practice—Administration—Insolvent Estate—Minority of Party interested—Grant to Creditor as single Administrator—Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 160, *sub-s.* 1; 162, *sub-s.* 1—*Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

The Judicature (Consolidation) Act, 1925, s. 160, sub-s. 1, directs that either a trust corporation, with or without an individual, or not less than two individuals, shall take a grant of administration in the case of an interest in the estate during minority of the party interested; but this provision must be read subject to the modification of s. 162, sub-s. 1—namely, that the Court in the case of insolvency is to have a discretion to grant administration to some person other than those interested in the residue. Under the latter section it is competent for the Court, even during a minority, to appoint a creditor to be a single administrator, as it could formerly have done under the Court of Probate Act, 1857, s. 73.

MOTION for a grant of administration ad colligenda of the estate of Herbert Leopold Herbert, who died on February 24, 1926, leaving a widow and an infant child.

The estate was insolvent and estimated to be worth not more than 3*s.* 4*d.* in the pound. It consisted of cash book debts and stock in trade, and needed the protection of an administrator. There was no real estate. The widow had disclaimed for herself and her child. The applicant was an unsecured creditor of the estate to the extent of 1558*l.*

*H. W. Barnard* for the applicant. The question is whether, there being a minority, the Judicature (Consolidation) Act, 1925, necessitates a grant either to a trust corporation, with or without an individual, or two individuals, or whether the special circumstances of the insolvency make it possible to grant administration to a single person who is a creditor. The Act of 1925 provides by s. 160, sub-s. 1, that "administration shall, if there is a minority . . . . be granted either to a trust corporation, with or without an individual, or to not less than two individuals"; and by s. 162, sub-s. 1, "that where the deceased died wholly intestate as to his estate, administration shall, unless by reason of the insolvency of the estate

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or other special circumstances the Court thinks it expedient to grant administration to some other person, be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose." This latter section is similar in effect to the Court of Probate Act, 1857, which remains unrepealed by the Judicature (Consolidation) Act, 1925.

*T. Bucknill* for the widow.

THE PRESIDENT (LORD MERRIVALE). The first section must be read subject to the modification of the second. But for the insolvency of the estate the existence of special circumstances in the present case might be doubtful; but having regard to the insolvency, I think that the Court has power to make a grant to a single administrator, in spite of the minority, as it would have done under the Court of Probate Act, 1857, s. 73. The grant, however, will be a full grant to a creditor and not ad colligenda as moved for.

Solicitors for applicant: *Biddle, Thorne, Welsford & Gait.*

Solicitors for widow: *T. F. Peacock, Fisher, Chavasse & O'Meara.*

J. R. B.

DIVORCE.

1926
*April* 15.

## W. *v.* W.

*Divorce—Custody of Infant—Restitution of conjugal Rights—Non-compliance of Husband—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 6—*Guardianship of Infants Act*, 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 1—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 193, *sub-s.* 2—*Welfare of Child paramount Consideration.*

There is no settled practice that after a husband's disobedience to decree for restitution of conjugal rights, the custody of children should be refused to the husband or given to the complaining wife. The paramount consideration must be the welfare of the children.

Adjourned Summons for custody.

In this case the husband had brought an action for dissolution of marriage on the ground of his wife's adultery, but no evidence was offered at the hearing, and the action was dismissed. The wife then obtained an order for restitution of conjugal rights. The husband did not comply with the order. The wife took out a summons, dated October 30, 1925, for the custody of the only child of the marriage, a boy nearly five years of age. It appeared that the parties had never had a separate matrimonial home, but had resided with the husband's parents, and the child had spent all his life with his grandparents. The case was heard on affidavit evidence in chambers, and orders had been made for the mother to have access to the child. Finally the President adjourned the case into Court for judgment only. The facts and arguments appear in the judgment.

*W. O. Willis K.C.* and *Hon. Victor Russell* appeared for the wife.

*Hawke K.C.* and *R. M. Middleton* for the husband.

The President (Lord Merrivale). This is an application for custody of the child of the marriage, made by the wife, the marriage subsisting, under the provisions of s. 6 of the Matrimonial Causes Act, 1884, since repealed but re-enacted. At the time these matters arose, a consolidating statute

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was not in operation, and it is convenient to refer to the clause to which reference was made. It is an extraordinary case, and it is a case I have found it difficult to deal with. It is characterized by such unusual circumstances that I thought it better that the matter should be fully argued and that I should give judgment upon the questions which were raised.

The parties were married in 1919. The child in question is now a few weeks less than five years old. The parties lived happily for some years after the marriage. I daresay that it was a disadvantage that by reason of the disability due to the effects of military service, the husband was able only to make a home with his parents, who were, and are, well to do people. Things went on well for some time there, but in the latter part of 1923 there was conduct of the now applicant, the wife, upon which I do not intend to enlarge at all, but which is material in relation to some aspects of the case, which led perfectly naturally to a suit by her husband for a dissolution of their marriage. That suit began in January, 1924, and as a preliminary to the suit, the husband had required the wife to leave the matrimonial home in his parents' home, and she had gone. It is sufficient to say with regard to the character of the suit, that it arose out of what I, so far as I can judge of the facts, am satisfied was a passing infatuation not accompanied by any guilt on the part of the wife which entitled the husband to a dissolution of marriage. The suit came on for hearing in October of 1924, and experienced counsel for the then petitioner, the husband, announced to the Court that he intended to offer no evidence upon the charges, and the suit was dismissed. After the dismissal of the suit there was correspondence between the husband and wife—a perfectly natural correspondence under the circumstances. I can only deplore that there was not a little more mutual accommodation and perhaps a little more courage and sacrifice, because if these people had come together then, as they honourably might have done, all this unfortunate question about their relative rights in the control of a little boy of tender years would have

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been absolutely avoided. Correspondence took place, there were protestations and requisitions, but they led to nothing. Thereupon the wife instituted a suit for restitution of conjugal rights under the Act of 1884, as it was then in force, and that suit was defended. The husband alleged that the wife had gone from him in circumstances which did not entitle her to call upon him to receive her again, and he also relied upon the matters upon which he had been led to proceed for dissolution of marriage. The case was tried before Hill J., and my learned brother made a decree for restitution of conjugal rights. There the matter stands: the decree has not been obeyed and no subsequent proceedings have been taken.

The main object of the statute of 1884 was that where there was wrongful refusal by a spouse to cohabit, the one party or the other might put himself or herself in a position to proceed as upon an actual desertion. The statute provided that in lieu of the old remedy derived from the practice of the Ecclesiastical Courts of attachment of the party disobeying the order of the Court, there should be a new right on the part of the complaining party to proceed, either upon the ground of desertion to obtain a decree of judicial separation, or if there was the necessary misconduct, upon the allegations of adultery and desertion to obtain a divorce. Recent changes of the law have made the intended operation of the statute of 1884 much less important than it was a few years ago.

As I have said, the petitioner, the now applicant, obtained her decree, and the respondent, the husband, is in contempt. There the matter rests, and if it were not that s. 6 of the Act of 1884 gave an express power to the Court to deal with the question of custody, maintenance and education of a child or children, as might have been done pending the hearing of a suit for judicial separation, this application could not have been made. Now it is made, and I have to deal with it.

I have to consider, first of all, what is the technical or statutory right of the now applicant, whether, according to the practice of the Court, the party against whom a decree

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is made, using everyday parlance and not technical terms, is placed thereby in the common position of a delinquent party under a decree of the Court and prima facie may be supposed to have become disentitled to custody of the children of the marriage. The decree in this case is not such a decree as is followed in the ordinary course by an order for custody.

Where there is a decree of divorce or a decree of judicial separation upon grounds upon which such decrees are made, it is common knowledge that unless cause is shown to the contrary the custody of the children of the marriage is granted to the complainant party. The assumption which arises in cases of that kind does not apply in this case. There is no common practice of the Court which governs it. If you refer back to the old procedure before the Act of 1884, an application for custody because one of the parties was in default in obedience of an order for restitution of conjugal rights would have been looked upon with amazement.

I have to consider no doubt the effect and implications of the powers which were embodied in s. 6 of the Act of 1884, but fortunately I have something much more helpful to guide me. I have the provisions of s. 1 of the Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), which provides that where in any proceedings before any Court the custody or upbringing of an infant is in question, the Court in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether, from any point of view, the claim of the father or any right at common law possessed by the father in respect of such custody or upbringing, is superior to that of the mother, or the claim of the mother is superior to that of the father. So, although I endeavour to explain the view I take as to the grounding of an application of this kind upon the powers which were and are contained in s. 6 of the Act of 1884, I emphasize the fact that the governing consideration here is that laid down in the recent Act which came into operation late last year, that what the Court has to take into consideration is the welfare of the infant.

The case is not an easy one from that point of view. Many

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elements enter into the welfare of an infant when matters such as are here under consideration have to be determined. Sometimes great importance is attached to the present and future material interests of the child. No doubt they are important matters, but I do not think the view of the Court has ever been that they are by any means the most important matters. The matters of immediate consideration are the comfort, the health, and the moral, intellectual and spiritual welfare of the child.

It is necessary to consider what the position is and what the conduct of the parties has been so far as it bears upon the question of the welfare of the child. The parents of both parties, I have no doubt, are highly respectable people, to whom these events in their family history might well be a cause of profound grief. The parents of the husband are well to do people. The husband's father is a man engaged in flourishing business concerns. The wife's father is a man engaged in a highly respectable occupation, but not so well off. For the five years of its life the child has lived in the home of its grandparents, its father's mother and father, and it is there now, and I am satisfied upon the evidence that it has grown up there well cared for, healthy and happy. I am satisfied that there is every prospect that the husband's parents will continue their care for the child which has involved them in outlay and will involve them in outlay, and I am satisfied of the assurance of the husband's father as to his intentions. That is material, because accepting the assurances which were given by the husband's father upon oath, I am bound to say that if they were in any degree falsified at any time, it would affect my whole view of this matter. That is the present position with regard to the immediate comfort and the immediate upbringing of the child. I cannot give the child the care of both parents, to which it is entitled, and I have to consider what can be done in that respect. The mother proposes that there should be an order for custody, and that she should take the child to live in her father's house. I have not any doubt that she would take care of the child and that the child would come to be happy with her

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and that the child when he has been with her has been happy. I have had great difficulty in determining whether the contempt in which the husband is is a ground for some exceptional order in this case, but, on reflection on that matter, I am satisfied that to deal with the future of the child because one of the parents was in contempt of Court would be to entirely disregard the provisions of the Act of 1925, and, I think, it would also disregard the old practice of the Court under the principles derived from the Courts of Ecclesiastical Jurisdiction. The contempt of which the father has been guilty puts him in peril of other proceedings, but it does not in my mind substantially affect this question. Balancing as well as I can the relative advantages which are offered here, it seems to me that the well being of the child while it is of tender age requires peremptorily that the child should remain ordinarily in the care in which since its birth it has been, and therefore I do not propose to make any order for the custody of the child at this time. But on the other hand it is of great importance to the child that both its parents should be concerned in its welfare. They are not concerned at present in the way in which they ought to be. On one side or the other or on both sides they have put the child under a disability by their conduct. I hope that is not past curing, but at any rate, as matters stand at present, the view I have come to on all the facts of the case—the lamentable facts which led to the original proceedings, the conduct of the husband which has put him in contempt of an order which it was his duty to obey and all the past proceedings—is that the proper course is, making no order for custody to do what is in the power of the Court to ensure in the upbringing of the child that the advantage its grandparents are able to afford it shall continue, and that on the other hand the mother, who I was satisfied at the hearing honestly desired the utmost degree of participation in the well being of the child, should have such access as will, so far as may be, assist towards that end. I accept the assurances—they do not amount to an undertaking—of the husband's father, contained in an affidavit which is on the file. Adopting those assurances, I

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make no order as to custody, but I direct that the interim orders which I made as to access to the child pending the argument upon this application, shall be deemed to be in force until further order. They cover holidays and they cover the normal life of the child. They are orders which provide for constant access on the part of the mother at the father's home and for the periodical presence of the child during the holidays with the wife in the home of her parents.

I direct that those orders shall be deemed to remain in force, because I do not wish that these parties, who are not wealthy people, should be put to the expense of continual proceedings. I give the parties liberty to apply. I hope that it will not be necessary that they should apply. What I have said with regard to the relative duties of these people it may be that they will to some extent keep in mind, not because they are passages in the judgment of the Court, but because they bring to their attention the duty they owe to the child, which is not a bone of contention. It ought to have been a cause of union between them and, so far as I can see, is the only possible inducement to them at the present time to discharge the duties they took upon themselves when they were married.

Solicitors for wife: *Hatchett-Jones & Co., for Bolton & Davidson, Bristol.*

Solicitors for husband: *Vallance & Vallance, for H. Gwynne Parry & Levy, Bristol.*

J. R. B.

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*March* 16, 17, 18.

*Observations of* LORD MERRIVALE, P., at pp. 133-135, *approved*. *Re* WINGHAM (*decd.*). [1948] 2 All E.R. 908.

PROBATE.

## *In re* BOOTH.

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*Probate—Soldier's Will—Actual Military Service—Commencement—Accidental Burning of Will—Revocation—English Law not identical with Roman Law—Wills (Soldiers and Sailors) Act*, 1918 (7 & 8 *Geo.* 5, *c.* 58).

For the purposes of a soldier's will actual military service begins on receipt of orders to proceed abroad in order to serve in a campaign. The rule of Roman law that a will made in the manner allowed for a soldier's will is only good for a year after the soldier's discharge does not apply to English law.

If a will is accidentally destroyed by fire, mere acquiescence by the testator will not amount to voluntary revocation.

THE plaintiff in this action was the widow of Colonel Thomas George Booth, who died in 1924 at the age of eighty-one. She claimed as sole beneficiary under a will alleged to have been made in 1882 when the testator was a soldier in actual military service. The will was made in Gibraltar when Colonel Booth was serving as paymaster in the 46th Regiment stationed there. The will was in the following form: "I leave everything I have to my wife absolutely. I hope she will have regard to my sister Mary." Signed, T. G. Booth, Paymaster, 46th Regiment. Witnessed by . . . . Pay Serjeant, Regimental Pay Office, Gibraltar, 1882. This he enclosed in a letter to his wife in the following words: "I am off to Egypt with the regiment and send my will with fond love. Will write when I get to Egypt." Colonel Booth went with his regiment to Egypt and served through the campaign against Arabi Pasha.

The Court held on the evidence that the will was written and executed after the regiment had received orders for Egypt and when it was on the eve of starting.

The wife received the will and put it in an old wooden plate chest which was kept in a locked closet in Hawstead House, where she and her husband lived. The husband returned. But in 1916 Hawstead House was burned down,

and the judge accepted the evidence that the will must have been destroyed. The wife brought this action to establish the will. The defendants were Arthur Payne Booth, the heir at law of the deceased, and John Brooke Booth, his next of kin.

The widow gave evidence, which the judge accepted, that her husband had several times after the will was burned said to her: "You have my will." Other relatives gave evidence that he had spoken of himself as intestate.

*Sir Ellis Hume-Williams K.C.* and *J. H. Watts* for the heir at law. The evidence of the contents of the will in this case is so slight and unsatisfactory that it would be dangerous for the Court to act upon it. The plaintiff's recollection of the contents as given in evidence differed materially from the document set out in the statement of claim, and the only evidence is that of an interested party. Even if it were established that the testator had made the will, and that it had been accidentally destroyed by fire, he acquiesced in its destruction, and that would amount to a ratification of its revocation: *Mills* v. *Millward* (1); *Gill* v. *Gill*. (2) It is a further and fatal objection that the alleged will could only be good as a soldier's will, and at the time it was made the testator was not on military service. Moreover military wills follow the Roman law and cease to be operative one year after the soldier's discharge.

*H. W. Barnard* followed on behalf of persons cited who also opposed the will.

*Bayford K.C.* and *F. L. C. Hodson* (*T. Bucknill* with them) for plaintiff, the widow of the testator. There is no foundation for the suggestion that a soldier's will ceases to be operative from one year after his discharge. It appears to be founded on dicta in *Drummond* v. *Parish* (3), but it never was part of the English law, which was not in the matter governed by the civil law, and was contrary to the Wills Act, 1837 (1 Vict. c. 26): *In the Goods of Coleman* (4); *Wood* v.

(1) (1889) 15 P. D. 20.
(2) [1909] P. 157.
(3) (1843) 3 Curt. 522.
(4) [1920] 2 I. R. 332.

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*Gossage.* (1) A will which has been accidentally destroyed cannot be revoked by any subsequent acquiescence of the testator in the destruction, that would be contrary to s. 20 of the Wills Act, 1837. The contents of the will have been sufficiently established, and it was plainly written by Colonel Booth between his regiment receiving orders and the actual sailing, i.e., when he was on actual military service.

[THE PRESIDENT. Surely the strongest thing in your case is the words of the letter that Colonel Booth was "just off to Egypt."]

*Clifford Mortimer* for the deceased's next of kin. It is a remarkable proposition to ask the Court to pronounce for a document which exists only in the mind of one person who is alone able to give evidence about it; she is the sole beneficiary and is speaking of events which took place over forty years ago.

The burden was on the plaintiff to establish the exact period at which the will was made; it is for her to satisfy the Court that it was made at a time when the testator was under orders. Unless she could do that, she must fail. Even if it were found that Colonel Booth had written the will in barracks after receiving orders to sail for Egypt, that did not constitute him a soldier in actual military service: *Bowles* v. *Jackson* (2); *In the Goods of Hiscock.* (3) It has been laid down in *Drummond* v. *Parish* (4) that the privileges of British soldiers as regards wills are the same as the testamentary privileges of the Roman soldiers; and in Justinian's Institutes, Book II., tit. 11, it was laid down that a testament executed in camp without formalities, that is to say not according to the forms prescribed by law, will remain valid only for one year after the testator's discharge. That provision was recognized by the modern civil law: *Shearman* v. *Pyke* (Hil. Term, 1724), cited in *Drummond* v. *Parish.* (4) The position of the British soldier in this matter was not affected by the Wills Act, 1837, or by the Wills (Soldiers and Sailors) Act, 1918. The privileges of the British soldier remained the same as

(1) [1921] P. 194.
(2) (1854) 1 Spinks' Ecc. & Ad. 294.
(3) [1901] P. 78.
(4) (1724) 3 Curt. 539.

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under the Roman Emperors, and Colonel Booth's will therefore had ceased to have effect one year after his retirement from the Army.

THE PRESIDENT (LORD MERRIVALE). This litigation arises in respect of the estate of an alleged testator, whom I shall shortly describe as Colonel Booth, who died in the year 1924 at the age of something more than eighty; eighty-one, I think, was his reputed age. There has been a grant of letters of administration to the widow whom he left surviving him. They had been married since, I think, 1879, and the widow upon his death obtained by the usual means, an affidavit of intestacy and so forth, a grant of letters of administration. She claims in this action to be the sole beneficiary under what is concisely called a soldier's will, which she alleges to have been duly made as a soldier's will in 1882, which she propounds and which, it is said, was accidentally burned in 1916. It is said on the part of the plaintiff that her husband, as she believed, adhered to the intentions of his alleged will of 1882 down to the time of his death; and there is evidence and an amount of verisimilitude about it which, if it stood alone, might well lead to that conclusion. It is said, on the other hand: No; no doubt he believed he had made a soldier's will and was aware of the facts which led to the supposition that it had been accidentally burned in a fire in his house in 1916, but he was well content that it should be burned, and from that time onwards he treated himself as intestate, proclaimed that he was intestate and ought to be deemed intestate. It is said, too, that what is alleged to have been a soldier's will made in 1882 under the privilege of persons engaged on actual military service is not proved in such a way that the Court could safely act upon it. It is said: You, the plaintiff, whose reputation nobody assails, and as to whose good faith nobody raises any question, have formed a belief as to what was in the document which you kept for some years and which was burned, but it is not safe, you being the alleged sole beneficiary under the will which you propound, upon

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your uncorroborated testimony, that such a document should be admitted to probate. Other very interesting questions are involved in the case and I will refer to them presently, but what I have said is sufficient to show that it is a case with a good deal of human interest, that it touches various departments of testamentary law, and it may be of considerable importance with regard to the military privilege of the making of an informal will when the soldier is on actual military service; and it may be important, too, with regard to the effect of such a will, the extent of its operation, and the mode by which it may cease to operate. Those questions have been dealt with to some extent. One or two of them, which I conceive to be the most difficult, have been only glanced at, but some of them have been very fully argued, and I want to say now that not a moment was lost in the time which was devoted to the case, and I am indebted to counsel for the thoroughness with which they examined the modern authorities.

The first substantial question in the case seems to me to be this: What was it Colonel Booth did in July of 1882? If he had died while he was on active service during what was called the Egyptian War, which began with the bombardment of Alexandria in 1882, would a Court of Probate then properly have admitted to probate what is alleged to be a military will? That raises questions of two sorts. There is a set of questions involved in the inquiry whether the evidence of the plaintiff as to the document which she received can be accepted and ought to be accepted. What she says is that she received from her husband while she was in England and he was serving with the 46th Regiment, 2nd Battalion of the Cornwall Light Infantry, a letter which enclosed what she describes as his will and what she says he described as his will. She says that in his letter he wrote to this effect: "I am just off to Egypt with the regiment and send my will, with fond love. Will write when I get to Egypt," and she says that enclosed in that was a document which, as to the sworn evidence in the case, was in these terms as to its operative words: "I leave everything to my wife. I hope

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she will have regard to my sister Mary." She says that that was signed by the testator and witnessed by a pay sergeant. He was paymaster of his regiment at that time and he would have a pay sergeant, of course, in his office. She describes the official paper upon which in the regimental pay-office these documents had been written. It is pointed out that in the statement of claim the plaintiff stated that the operative words of the will were these: "I leave everything to my wife absolutely. I hope she will have regard to my sister, Mary." That, it will be seen, differs in wording, but not in effect, so far as I apprehend the effect of the document, from what is stated by the witness upon her oath. It is said, too, that in the witness box she omitted to append to the statement of the operative words, as she alleges them, a statement of the place and date of the supposed execution. I have considered those matters and I have taken account of the plaintiff as a woman who has lived an honourable life and who alleged this will at a time when she supposed it had no efficacy at all and left her the victim of her husband's intestacy; she set up the will as an ineffectual incident of the past. I am satisfied of the honesty of the plaintiff. I am satisfied that she received a letter such as she described, and that the document which it contained was a document purporting to be a soldier's will made in pursuance of the military privilege, and a document which, so far as it could have testamentary operation, bequeathed to her what could be disposed of by such an instrument. Taking that view of the facts I come to the conclusion in point of law that if in 1882, in the course of the campaign, the husband, Colonel Booth, had lost his life, this will would have been without question admitted to probate as a soldier's will. That is the first step in the case.

Then come these inquiries: Assuming this to have been a soldier's will, was it in operation at the time in 1916 when it was destroyed by fire or it is said to have been destroyed by fire? I find, in fact, that the document was accidentally burned in a fire, which was described by various witnesses, in Colonel Booth's house, Hawstead House. I find also

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that it had been kept down to that time as the will of Colonel Booth, that he and his wife regarded it at that time as an effectual testamentary disposition, and that it was the only testamentary disposition he had made. There was called a clear-headed witness who had no interest in this matter and whose testimony, I think, was not seriously questioned, who described how presently after the fire Colonel Booth told him of the destruction of a great many documents and that he feared his will had been destroyed in the fire, and he said that shortly afterwards Colonel Booth upon his inquiries said he thought it must have been destroyed, or something to that effect. It could not be found. But the evidence, which I accept, of the plaintiff in respect of these matters, corroborated as it is in various quarters, satisfies me that Colonel Booth and the plaintiff regarded this document as an effectual testamentary act down to its destruction by fire in 1916.

There is a separate question whether the document was, in truth, operative as a will in 1916. I shall deal with that more at length.

There is another question with regard to the effect of conduct and declarations of Colonel Booth between 1916 and 1924. As to them I must add a few words to what I have said. There is a good deal of testimony which, on the face of it, seems to be inconsistent and to reflect in a singular way upon the sincerity of the testator. This testimony, taking it at its face value, suggests that to his wife he was making comforting assurances that he believed she had got his will, and to her friends saying she was secure. There is one statement which goes so far as to say that she would have Hawstead House, and there are others. I am satisfied that Colonel Booth did tell his wife in a jesting way that she had his will, and that at times he probably entertained a supposition that it might not have been destroyed. I cannot get beyond that. I cannot reject either the evidence of some of the witnesses that he spoke to them with regard to his testamentary position in a way which suggested that he had it on his mind and was not content with the situation of

things as he appeared to his wife to be. She was anxious, because she was sure the will was destroyed. He probably bantered her. He had given it into her care. It had not been quite certain that it was destroyed. She believed it was, but there are happy accidents as well as unhappy accidents, and it may well be that he believed at some times that, with her care of the matter and with her interest, she had taken care of it better than she supposed. But, at any rate, he discussed his testamentary position with members of both families. There are two parties of witnesses here. There are those who are on the side of the plaintiff, who come from the Metcalf side which was her side of the house, and those who are on the side of the heir at law and the next of kin, who come from the Booth side of the house, and it may be that some honest differences are accounted for by that fact. Great care has to be taken in dealing with the evidence which is here under consideration. I will give an instance of that. There was a respectable witness of good position who came into the witness box and who said: "Uncle said he had left 'Hawstead' to my brother Dick, and then afterwards when Dick was dead he said he had left it to my brother Robert." The same witness, quite unconscious of any departure from accuracy, said presently afterwards that what the testator said was he was "going to leave it to Dick" and what he said afterwards was that he was "going to leave it" to the other brother. That is a fair illustration of the pitfalls there are in considering the testimony in a case of this kind. Then I noticed that there was, as sometimes happens in testamentary disputes, the evidence of people who had expectations and who, upon things the testator had said more or less cautiously or more or less incautiously, had formed hopes that they, or their immediate connections, were the objects of his intended benefits. I have come to the conclusion that from 1916 to the time of his death the testator did not know whether his will was really in existence, that he believed it probably was not, and that in that state of things he occupied his mind from time to time with the question of what testamentary disposition he ought to make. I think that accounts for the

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evidence I have received, giving it such credit of actual accuracy as I am able to. I am satisfied that he did not come to any effective conclusion—that there was no decision of his which interfered with any legal efficacy the will of 1882 may have had, if it had legal efficacy, at the time it was burned, or after the time it was burned. I am inclined to think that counsel who addressed me upon various problems of law inclined to this view from the turn their arguments took, assuming, of course, that I find that this in form was an effectual testamentary act in 1882.

I must go back to the effect of the alleged testamentary act in order to examine the arguments which were presented to me upon the footing that at the time this document was written the writer was not within the terms of s. 11 of the Wills Act which regulates the soldier's privilege of making a will when on actual military service. That was fully debated. Sir Ellis Hume-Williams dealt with it, and Mr. Mortimer, in a learned and able argument, dealt further with it, and it is proper that it should be dealt with. The facts of the case raised the question. It is necessary to know, therefore, when it was that the alleged soldier's will was written. I come to the conclusion, in point of fact, that it was written when the 46th, in which the writer was, had received its orders for embarkation and was on the point of the embarkation, and I am as well satisfied as one can be on matters which depend to some extent upon inference that the point of time at which it was written was substantially nearer to the moment of the embarkation than to the time at which the orders to prepare for embarkation were received. We know when the orders for embarkation were received. That was at a time practically coincident with the opening of hostilities; it was either some time on July 10th, or early on the 11th. I do not think that is quite clearly determined by the evidence. It is stated at times to be on the 10th. But the orders were that the regiment was to be ready for embarkation on the *Mombasa* by dawn on the 14th. It was during the period when the regiment was under those orders and was preparing for embarkation on the trooper that this

document was written, and my own belief upon the subject is that it was probably written some time on the 13th. That tallies with the facts as I appreciate them, and with the making by a man of education and position in life and of some substance of a military testament. It is quite clear that the man who wrote the document I find to have been written knew of the soldier's privilege of making a will. What is the result of those findings?

I was referred yesterday to two cases on this subject. One of them was *Bowles* v. *Jackson* (1), in which Sir John Dodson expressed himself with regard to an alleged military testament said to have been made in the summer of 1839 to the effect that a man on military service in the Indian peninsula who had received orders to march for the purpose of joining forces outside the Presidency where he was in order to assist in military operations in independent territory, but had not set out, was not in expeditione, using a technical expression which has come to be familiar in this class of case. It is remarkable that Sir John Dodson discussed the matter from two standpoints. He examined the facts first of all to see whether the alleged testator was inops consilii, which is an important element, and then he considered whether the alleged testator was in expeditione, and found that, in fact, he had not actually set off and so, although he had had his orders and was due to march with the forces with which he was engaged for the purpose of military operations, he was not engaged in actual military service. That, of course, is a finding of fact. It does not declare the law in any way, except in so far as it illustrates it, but I thought yesterday, and I still think, that if the ideas latent in that decision were to have their full effect here, the case would be an obstacle in the way of the plaintiff. Sir John Dodson, as those who are familiar with the practice of law in matters of probate well know, was an exceedingly learned lawyer in such matters —he was an eminent civilian—and if the case stood alone, very grave consideration must be given to it. It has been recognized as of authority with regard to the question of

(1) 1 Spinks' Ecc. & Ad. 294.

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when a soldier is deemed to be in expeditione. *Drummond* v. *Parish* (1), a decision of Sir Herbert Jenner Fust, another very eminent civilian, was also relied upon, but that decision is not in point in the manner in which the decision in *Bowles* v. *Jackson* (2) was in point. The question there arose with regard to an officer who was not under orders for active service, who was, in fact, stationed at a military station in this country, and who purported to exercise the military privilege apparently under a supposition, which had some currency at that time, that every soldier who was with the Army and not retired had the privilege of making a military testament. The case throws no real light upon the present question, but the discussion in it is of importance with regard to another aspect of the case which I must consider presently. *Bowles* v. *Jackson* (2) is the case of authority which can properly be cited in favour of the defendants. I have to see upon principle, and with regard to the instances which occur in the decisions of learned judges, not whether the officer in *Bowles* v. *Jackson* (2) was in actual military service—that is settled beyond all question—but whether Colonel Booth when he wrote the paper which is in question here was in actual military service. There is a great deal of more modern authority on that subject. There is the decision of Lord Penzance in *In the Goods of Thorne.* (3) Lord Penzance —Sir James Wilde as he then was—attended to the case with all his wonted care, and adjourned it in order to make sure whether the soldier in question was in expeditione. The fact of the matter was that there were military operations by Her Majesty's Forces against the King of Ashantee, which was up-country beyond the Gold Coast, an independent native power inland in the Gold Coast and separated by long stretches of forest from the Gold Coast. The officer in question was at the Gold Coast. He had been ordered there with a detachment of his regiment from the West Indies to reinforce Her Majesty's troops on the Gold Coast, and on arriving on the Gold Coast he joined the expedition formed to march into the interior.

(1) 3 Curt. 522. (2) 1 Spinks' Ecc. & Ad. 294.
(3) (1865) 4 Sw. & Tr. 36.

While he was there and when he had simply been attached to a military formation in course of preparation he wrote the paper in question. Sir James Wilde held that the facts brought the case within the privilege then defined by s. 11 of the Wills Act. I think that is a strong decision in favour of the plaintiff's proposition here. Then there is the case of *In the Goods of Hiscock.* (1) That was the case of a member of the volunteer forces in this country who during the South African War against the Boer Republic in 1899 and subsequent years had, it was said, volunteered and gone into barracks with a view to his despatch overseas to fight in South Africa. It must be borne in mind that in all these cases the military situations which admit of technical description are usually described in popular terms. In the discussion of them in cases relating to soldiers' wills, the discussion is sometimes misleading. The word "mobilized" gets into the decisions as though "mobilized" were a term of art in the law, or even a term of art among military men. I do not believe it is either. But it is misleading when expressions are used as though they connoted inevitably a particular state of facts. What has to be looked at is the position of the testator in *In the Goods of Hiscock* (1), because Lord St. Helier held that Hiscock was on actual military service when he was in barracks, having volunteered. The facts I take it to have been these. Having been a member of a volunteer force at that time, enlisted with the limited liability to military service which then existed in respect of members of the volunteer force, he had enlisted in the regular Army with a view to serving in South Africa. That was his technical position as I understand it, and as a soldier in the regular Army he was in barracks with a view at the proper time to be embarked for South Africa, and there to take part in military operations. Lord St. Helier held that he was entitled to the military privilege. It is not necessary to discuss the terms of the judgment—the rejection of one test and the acceptance of another. The conclusion was that a soldier in barracks in England before he was

(1) [1901] P. 78.

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actually ordered for embarkation was in expeditione. That is a stronger case than the present one. Then there is *Gattward* v. *Knee*. (1) That also arose out of the events of the South African War. The man whose dispositions were in question was a private in the King's Royal Rifles, which, at the time, were in Calcutta, and at a time when, as he said, he was "just off to South Africa for the Boer War." He wrote a letter to a friend of his in which he purported to give him, in the event of his death, the property he possessed. He said in that letter: "Just off to South Africa for the Boer War." It was held by Sir Francis Jeune that that paper clearly was a testamentary disposition within the privilege. Colonel Booth in this case wrote the paper in question when he was just off from Gibraltar for Alexandria by way of Malta. I do not need to apply the case. I call attention to the facts. Then there is *In re Kitchen* (2), a case arising out of the Great War, to which it is not necessary to refer in detail further than to say this. The man became a soldier in February, 1917, spent his life in barracks until September, was told on September 4 to hold himself in readiness to go overseas, on September 5 went on what was called overseas leave, and at that time, while he was on his overseas leave in preparation for joining the forces overseas, he wrote the paper in question. It was held to be a military testament. There are other cases, but those instances, I think, help to give a clear view as to when a soldier may be, at any rate, confidently said to be on actual military service. I am not seeking to attempt definitions here. In my view, the time spent in the hearing of cases in attempting definitions is sometimes not well spent. If "mobilization" were the test, Colonel Booth was "mobilized." He and his regiment were in the course of making ready under orders to go on board a troopship for the purpose of reaching the scene of operations. That, in my judgment, is actual military service within the meaning of the phrase in the Wills Act. He personally was involved actively in the military operations which were then in progress. That can safely be said.

(1) [1902] P. 99. (2) (1919) 35 Times L. R. 612.

There is a work not of authority in a technical sense, but of interest here, the Manual of Military Law, which shows when those responsible for the discipline of the Army regard the soldier as being engaged on active service. It is fairly well known that a soldier on active service, by the code of military discipline, if he be guilty of some offences against military law, incurs the extreme penalty, where if he were not on active service, the penalty would be comparatively light; so that the military definition of "active service" is of great technical importance to the soldier apart from the question of whether he is on actual military service so that he can make a will. I find in the Manual of Military Law, published in 1914, this statement by way of commentary upon section 189 of the Army Act: "Troops under orders to proceed to the seat of War are 'attached to or form part of a force which is engaged in operations against the enemy' even before embarkation." And the cogency of that observation is seen when, upon reference to sec. 189, it is found that the expression "on active service" as applied to a person subject to military law means whenever he is "attached to, or forms part of a force which is engaged in operations against the enemy." Then he is not merely on actual military service but on active service subject to the rigorous treatment which military discipline directs. That is the military view. I make no apology for introducing the matter, because Sir Francis Jeune, who for a long time was Judge Advocate-General, did the same thing in *In the Goods of Hiscock.* (1) I do not found my judgment upon it—I found my judgment upon the law—but that is a fact of military practice which is not immaterial in order to see whether the cases ought to have and properly have the effect which I take them to have. And so on the debated question of whether Colonel Booth at the time he wrote this paper was on actual military service within the meaning of the expression in s. 11 of the Wills Act I find without doubt that he was.

What results from the course of events during the period after 1882? Colonel Booth came back safely from the war.

(1) [1901] P. 78.

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He survived forty-two years. He prospered in a modest way so that, either with his wife's assistance or by one means and another, he had amassed a modest fortune of 11,000*l.* or 12,000*l.*, which is the subject of this litigation. It is necessary to see what happened after this military testament was effectually made to see whether it was in operation at the time of the death of the testator. The matter was dealt with in two, if not three, ways. It was said that the testator knew that this document was burned, and, the phrase was used, ratified its destruction. There is no doubt as to what is meant. What is meant is that, believing himself to be intestate, he acquiesced in intestacy. That he ratified what had been done was contended upon the footing of the case of *Mills* v. *Millward* (1), in which case the sister-in-law of the alleged testator in a fit of temper had thrown his will into the fire, and he had condoned the offence, as it were, and forgave her for it. It was said that the burning of the will was a destruction of his will which, if he had done it himself, would have been an act of revocation under the Wills Act, and, as he adopted it, it amounted to ratification. The view of Sir Charles Butt (Mr. Justice Butt as he then was) was that whether such suggested ratification was tantamount to destruction by the testator was a matter as to which he held very much doubt. I doubt very much whether it was a tenable proposition in any circumstances. The learned judge refrained from deciding whether that could be ratification, or whether it could be a destruction by the testator within the meaning of the Wills Act. Bargrave Deane J. came to deal with the same subject in *Gill* v. *Gill* (2), and he had no doubt that it could not. He said this: "If it was not done with his authority at that time . . . . no amount of authority afterwards can be brought into play so as to ratify it. If a testator under such circumstances desired that the act of destruction, performed without his authority at the time, should prevail, he had it in his power effectually to revoke his will in accordance with the provisions of the Wills Act." So I am satisfied that the argument of ratification or

(1) 15 P. D. 20.

(2) [1909] P. 157, 161.

adoption of the accidental destruction of this will by fire so as to bring the case within the operation of the appropriate section of the Wills Act of 1837 is not sound. It cannot prevail. This was not a destruction of the will by " burning, tearing, or otherwise destroying " by some person in the testator's presence and by his direction.

That does not dispose of the difficulties in the case. Two further questions were raised with regard to broad questions of law. Mr. Mortimer submitted that the privilege which the soldier has under the Wills Act of 1837 as he had under the Statute of Frauds is a privilege virtually identical with the privilege of the Roman legionary, and that it is subject to the same limitations. That was one contention, but he made another. He contended that a soldier's will, if not wholly outside the operation of the Wills Act of 1837, is substantially without the operation of that Act. I deal first with the argument as to the English law with regard to a soldier's will, and the proposition that, upon the authority of *Drummond* v. *Parish* (1), a case before Sir Herbert Jenner Fust in 1843, it ought now to be held that the civil law must be resorted to in order to ascertain the meaning of the provisions first of the Statute of Frauds and then of the Wills Act whereby there exists the military testamentary privilege. It is a courageous proposition. I doubt whether until this week anybody has ever previously suggested that a soldier's will expired and became inoperative at twelve months from the date of its being made, but there is language in the judgment of Sir Herbert Jenner Fust which forms a basis for the argument. The judgment abounds in learning with regard to the civil law. I need not diverge into that topic. What I have to ascertain is what is the law of England applicable to soldier's wills, and I have to see whether it has been decided that the military testamentary privilege here is the adoption of the terms of the Roman law with the limitation apparently incorporated in those terms that a soldier's will should operate for twelve months only. I confess if I had taken a different view from the one I take as to the English authority for the

(1) 3 Curt. 522.

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proposition, I should have liked the subject of the true terms of the Roman law more thoroughly investigated, because I find in passages of authority in Roman law—passages in the Digest and elsewhere—with regard to the period during which a soldier might make his will, that he might apparently make a military will for twelve months after he had, to use the English expression, left the colours, and after he had been released from active service, and I am not at all sure that this proposition for which Sir Herbert Jenner Fust's authority is cited is consistent with that fact. Sir Herbert Jenner Fust founded himself upon a passage in the preface to the Life of Sir Leoline Jenkins. Sir Leoline Jenkins, as everybody knows, was probably the most eminent authority upon Roman law and civil law in this country in the seventeenth century. He was a very eminent man who was not only a distinguished lawyer, but was in his time secretary of state and ambassador. Sir Herbert Jenner Fust says this: "It appears, from the Preface to the Life of Sir Leoline Jenkins, that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English Army the full benefit of the testamentary privileges of the Roman Army." Then Sir Herbert Jenner Fust says: "Therefore I think it is quite clear, that the principle of the exception was borrowed from civil law; and that in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to." That was presented to me in the fairest possible way and must be dealt with, but I have to see what other knowledge there is as to the part of Sir Leoline Jenkins in the erection of the military privilege, and for that purpose I refer to the Statute of Frauds itself, in the framing of which Sir Leoline Jenkins is said by Sir Herbert Jenner Fust to have had the effectual power which it is suggested he had, and when I refer to s. 22 of the Statute of Frauds I find it in these terms: "Provided always that, notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea may dispose of his moveables, wages, and personal estate as he or they might have done before the making of this Act." There is

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not a word of incorporation of the Roman civil law. It is not necessary for me to express the respect I feel for the memory of Sir Leoline Jenkins, or for anything which was said judicially of Sir Herbert Jenner Fust in that region of law in which he so long exercised his abilities, but it seems to me that the proposition that the English law as to the soldier's military testamentary privilege is identical with the privilege of the Roman legionary is an entirely mistaken proposition. What were the testamentary rights which the soldier or seaman had under the English law before the Statute of Frauds? So far as I know, they were the privilege which was common to English subjects of making informal testamentary dispositions. The privileges may have been greater. It is not necessary to consider that. But that they were the privileges of the Roman law with the limitations of Roman law I am not at all content to suppose. There is no case in our legal history that I am aware of, outside of the judgments referred to—the judgment in *Drummond* v. *Parish* (1) and the case which is referred to there of *Shearman* v. *Pyke* (2)—which gives any colour to the supposition that a soldier's will becomes inoperative at the expiration of twelve months from its being made, and neither of those cases is any authority for any such proposition. The question did not arise in either of those cases. I reject that argument.

But there remains another which is a more formidable argument to my mind, and it is this. The Statute of Frauds left to the soldier the privilege of will making which he had previously had without requiring the compliance with those stringent conditions which the Statute of Frauds introduced for the main body of the lieges. A soldier might make a written will as any Englishman might make one without any of the formalities of the Wills Act, and without any of the formalities provided in the Statute of Frauds. He might make a nuncupative will, that is, he might declare his testamentary intentions before witnesses. A nuncupative will had ceased to be in practical operation a long time before the Wills Act took effect, but it was kept alive for the soldier

(1) 3 Curt. 522, 531. (2) 3 Curt. 539.

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by the Statute of Frauds. It is no doubt kept alive for the soldier by the Wills Act, and in that aspect of the matter grave questions might arise. I have to see whether they arise in this case. The argument which was presented to me was that, this being an informal will, it is not within the provisions of the Wills Act, which provide and limit the methods and instances of revocation in respect to ordinary modern wills. The soldier's will was said to be outside of the operation of the Wills Act in that way. The real question I think is: Is a soldier's will a will within the meaning of the Wills Act? When the Wills Act deals with wills generally does it include a soldier's will as well as others? Mr. Mortimer attached importance naturally and properly to the terms of the section in the statute, and they are substantially the same as the terms of the section in the Statute of Frauds where the testamentary operation is not described as a will. I have not overlooked that at all. I have to consider whether the Wills Act when it limited the means of revocation of wills included soldiers' wills. In my judgment it did. The two sections of the Wills Act which deal with this matter are ss. 19 and 20. Sect. 19 enacts: "That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." That amendment of the old law as to revocation is relevant in the present case. Part of the argument against the will propounded by the plaintiff was the change of circumstances—the purchase of Hawstead, the incapacity of the plaintiff and other changed circumstances, the burning of the will and the fact of a possible question as to whether it might operate. Sect. 19 is in those terms, and then s. 20 directs "That no will or codicil or any part thereof shall be revoked otherwise than as aforesaid," that is, by operation of law, the marriage of the testator, "or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, or otherwise destroying the same by the testator, by some person in his presence and by his direction

with the intention of revoking the same." None of those events have happened in this case. I do not overlook the fact that s. 20 is not in its terms applicable to the case of a nuncupative military will—a military will declared by the soldier in the presence of witnesses—but this was not such a will. When that case arises it can be dealt with, and I hope whoever deals with it will have as much assistance from learned counsel as I have had in this case. This was a case of a written will within the implied description in some of the language in s. 20, and I come to the conclusion that change of circumstances and expression by the testator of hesitating views, or perhaps altered views, with regard to his will of 1882 do not affect the efficacy of that will. There is this to be added, that by a statute of 1918 the Legislature threw some light upon the view it held as to soldiers' wills, and it is a view which reacts upon the various propositions made by counsel as to the implied revocation, or the revocation by ratified destruction or other means of revocation of the will in this case. Sect. 3 of the statute provides that a testamentary disposition of any real estate made by a person within the privilege of the Wills Act who dies after the passing of the Act of 1918 shall, notwithstanding various disabilities, be valid in any case where the person was of such age and the disposition was made "In such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in England it would have been valid." It will be seen there that the statute seems to be framed upon a view which ignores, if it does not negative, the supposition that the soldier's will expired in a limited time, or that a soldier's will was terminated by some mode other than that which applies to modern wills. It is a material section in this case, because upon its operation depends the question of whether the greater part of the estate of the testator is disposed of by the will of 1882. The will of 1882 when it was made and when it was accidentally burned did not dispose of anything but personalty. It is said here that, by virtue of s. 3 of the Act of 1918, it does dispose of the realty. That is a question of construction and administration,

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and I do not propose to say anything more about it. I refer to the matter only because of the light that the statute seems to throw upon the various propositions which I have discussed.

On the main questions here I come to these conclusions: that the instrument sent by Colonel Booth to the plaintiff from Gibraltar was a soldier's will; that it was written by him within the privilege reserved by the Wills Act, and was effectual at that time to pass his personalty; that it remained effectual to his knowledge until 1916; that the fire in 1916 accidentally destroyed it, but that its destruction was not a destruction which he intended or desired, or upon which he founded any subsequent conduct; that his conduct from 1916 to 1924 does not prove any intention to deprive the will of 1882 of any operation which by law it had; that that will was in operation at the time of his death, and that I ought, therefore, now to decree its admission to probate in the words in which it was proved by the plaintiff in her evidence in the witness box.

Solicitors: *Smythe & Brettell; Warren, Murton, Miller & Foster; Collyer-Bristow & Co., for Partridge, Wilson & Co., Bury St. Edmunds; Ince, Colt, Ince & Roscoe.*

J. R. B.

[IN THE COURT OF APPEAL.]

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*Feb.* 11, 12;
*March* 10.

## *In the Estate of* WILLIAM PLANT (DECEASED).

## WILD *v.* PLANT.

[1925. P. 1000.]

*Probate—Practice—Costs—Executors—Will and Codicil propounded in solemn Form by Executors—Allegations by Defendants of undue Influence—Withdrawal at Trial—Will found to have been duly executed and pronounced for—Codicil found not to have been duly executed—Testator found not to have been compos mentis at time of Execution—Codicil pronounced against—Form of Order—Order* LXV., *r.* 1—*Appeal as to Costs—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 49—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1 (*h*).

The proviso to r. 1 of Order LXV. that nothing in that rule contained shall deprive an executor who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules theretofore acted upon in the Chancery Division, governs the case of bare executors who reasonably propound a will and codicil, even if, though the will is pronounced for, the codicil is pronounced against. The position of such executors differs from that of persons named as executors in a testamentary paper which they unsuccessfully propound. Having established the validity of the will, and made good their position as the testator's executors, they are entitled to their costs of the litigation out of the estate as between solicitor and client, and can be deprived of that right, which rests substantially upon contract, only if they have acted culpably or unreasonably. Until that has been established, their costs are not in the discretion of the Court, and therefore, notwithstanding the provisions of s. 49 of the Judicature Act, 1873, repealed and re-enacted by s. 31, sub-s. 1 (*h*), of the Judicature (Consolidation) Act, 1925, an appeal lies without leave from an order condemning them in costs or depriving them of costs out of the estate.

Order of Wright J. as to costs reversed.

APPEAL from the decision of Wright J.

The following statement of facts is taken from the written judgment of the Master of the Rolls :—

The plaintiffs in this suit were the executors named, but without any pecuniary interest, in the last will of William Plant, deceased, who died at Lytham in the county of Lancaster on April 1, 1925.

The defendants had entered a caveat against probate

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being granted to the plaintiffs and required proof in solemn form of the will dated April 24, 1924, and an undated codicil which in fact was signed on January 5, 1925.

The plaintiffs thereupon on May 5, 1925, issued the writ in the present suit for this purpose. The defendants, who are respectively the widow and daughter of the deceased, defended the suit. They denied that the will had been duly executed; and as to the codicil, they denied that at the time of its execution the testator was of sound mind, memory and understanding. They gave particulars as to the deceased's condition at the time when the codicil was signed, and alleged that undue influence was exercised by one Norah Faulkner, who had been the deceased's mistress. In some further particulars, it was alleged that Norah Faulkner had secured the attendance of and attestation by Myers, a solicitor, who had acted for the testator for some twenty-five years, and one Banville. The net estate was of the value of about 15,000*l.* No charge of misconduct was made, still less established, at the trial against the plaintiffs.

The trial took place before Wright J. and a common jury on November 3, 4, 5 and 6, 1925. The jury found that the will was duly executed, and the judge pronounced for it. The plaintiffs thus established their position as executors under the will. On the issues raised as to the codicil, the jury found that it had not been duly executed and that the deceased was non compos mentis at the time when it was signed by him, but they must be taken to have found against the defendants on the issue of undue influence, which was not persisted in. The two issues on which the jury gave their verdict occupied the bulk of the time taken at the trial. Wright J. entered judgment for the defendants on these issues, and made an order that the defendants recover the general costs of the action against the plaintiffs, but ordered that in default of payment by the plaintiffs, the defendants were entitled to recover them out of the estate: and "in so far as the costs have been increased by putting the due execution of the said will in issue, such costs as between solicitor and client be paid to the plaintiffs by the defendants."

This order as to the costs was made after argument in London.

The plaintiffs appealed, and by their notice of appeal asked the Court to set aside so much of the judgment of Wright J. as adjudged that the defendants recover the costs incurred or to be incurred in the action, including the general costs against the plaintiffs, and ordered that in default of payment by the plaintiffs, the said costs were to be paid out of the estate of the said deceased, and for an order condemning the defendants in the costs of the issues of undue influence and of undue execution of the will of the deceased raised by them in the said action, and that save as aforesaid the costs of all parties to the said action be paid out of the estate of the deceased.

The appeal was heard on February 11 and 12, 1926.

*Singleton K.C.* for the respondents took the preliminary objection that this was an appeal purely relating to costs, and that under s. 49 of the Judicature Act, 1873, repealed and re-enacted by s. 31, sub-s. 1 (*h*), of the Judicature (Consolidation) Act, 1925, no appeal on a question of costs lies except by leave of the Court, and that unless the appellants could bring themselves within the recognized exceptions to that principle, the Court had no jurisdiction to hear the appeal.

The Court decided to hear the appeal.

*Eastham K.C.* and *Clifford Mortimer* for the appellants. The appellants, as mere executors, were bound to come to the Court to prove the will and codicil in solemn form, because a caveat had been entered by the defendants. There was no evidence before the judge to show that they had acted improperly, and they ought not to have been deprived of their costs. They have done nothing unreasonable, and under the first proviso of r. 1 of Order LXV. they are entitled to their costs. The judge followed the ordinary rule in jury cases. He did not exercise any discretion. There was no evidence before him on which he could adjudicate on the

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question of costs as he did. He awarded costs on the wrong principle, and an appeal will lie: *Edmund* v. *Martell* (1); *In re Sarah Knight's Will.* (2) The objection taken against the appeal is under s. 49 of the Judicature Act, 1873, repealed and re-enacted by the Judicature (Consolidation) Act, 1925, s. 31, sub-s. 1 (*h*), but that only applies where there has been an erroneous exercise of a discretion on particular facts.

When once the will is pronounced for and proved in solemn form, then before the judge considers any question of costs in the action, he must apply his mind to the right principle, and the executors are entitled to their costs unless they have acted unreasonably.

[SCRUTTON L.J. referred to *Page* v. *Williamson* (3) and to the general rule in cases of this kind stated by Gorell Barnes J. in *Twist* v. *Tye.* (4)]

If the will had not been pronounced for in the present case, the position of the appellants would have been similar to that of the executors in those cases, but this will has been pronounced for. Executors are privileged persons. The principles on which costs are awarded are stated in *Mitchell* v. *Gard* (5) and *Spiers* v. *English.* (6) The Probate Rules relating to contentious business were made in 1862, and were saved by the Judicature Act, 1875, s. 18, except where they are superseded by Rules of the Supreme Court. Order LXV., r. 1, applies to the Probate Division, and applies to this case.

If an executor does not prove the will, and a legatee proves it, the executor may lose his costs: *In re Speke* (7), where the executors had acted unreasonably. We rely upon *Boughton* v. *Knight* (8), which most nearly approaches this case, and is not very consistent with *Rennie* v. *Massie.* (9)

*Singleton K.C.* and *G. J. Lynskey* for the respondents. The executors acted unreasonably in the circumstances. Many cases show that an executor who puts forward a bad testamentary document does so at his own risk. *Speke* v.

(1) (1907) 24 Times L. R. 25.
(2) (1884) 26 Ch. D. 82.
(3) (1902) 87 L. T. 146.
(4) [1902] P. 92, 93, 94.
(5) (1863) 3 Sw. & Tr. 275.
(6) [1907] P. 122.
(7) (1913) 30 Times L. R. 73.
(8) (1873) L. R. 3 P. & M. 64, 77.
(9) (1866) L. R. 1 P. & M. 118.

*Deakin* (1) is an authority against the appellants. An executor is prima facie justified in propounding a will: *Boughton* v. *Knight* (2), but he is not bound to do so unless he chooses: *Rennie* v. *Massie* (3), and if it be made to appear that an executor when propounding a will must have known that he was attempting to obtain the sanction of the Court to a document which could not be supported he ought to be condemned in costs: *Boughton* v. *Knight* (2); Mortimer on Probate Law and Practice, p. 693. Thus in *Page* v. *Williamson* (4) it was held that where executors have an ample opportunity of examining into the state of mind of a testator, and of getting a clear knowledge of the whole state of affairs, and yet take upon themselves the responsibility of propounding a will, they do so at their own risk, and, if they are defeated, the Court will not, except under special circumstances: *Boughton* v. *Knight* (2), interfere with the general rule that costs should follow the event: see Mortimer on Probate Law and Practice, p. 693.

It is submitted that the first proviso to r. 1 of Order LXV. does not apply to the present case. There is no rule in the Chancery Division which entitles the executor of a will to costs where he wrongly propounds another will altogether. It was only under special circumstances that the Ecclesiastical Courts directed costs to be paid out of the estate of the deceased: Williams on Executors, 11th ed., p. 284.

[LORD HANWORTH M.R. Is that of much assistance? We have here to apply Order LXV.]

An executor is in no better position than any other person where he puts forward a document other than the one under which he is appointed executor.

[SARGANT L.J. referred to *Ex parte Russell.* (5)]

The first proviso to r. 1 of Order LXV. has never been dealt with in probate cases: *Boughton* v. *Knight* (2), and does not apply to them. The second proviso is the one that is applicable, and it was on that proviso that Wright J. acted

(1) 30 Times L. R. 73.
(2) L. R. 3 P. & M. 64, 77.
(3) L. R. 1 P. & M. 118, 119.
(4) 87 L. T. 146.
(5) (1882) 19 Ch. D. 588.

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in the present case. There is no difference in principle between the case of an executor who has a financial interest under the will and that of a bare executor: *Twist* v. *Tye.* (1)

[*Eastham K.C.* They were not executors in that case. The will was pronounced against.]

It is true that the persons there named as executors did not succeed, as the will failed.

There are only two reported cases, *Rennie* v. *Massie* (2) and *In re Speke* (3), of the executors putting forward a later document. In the former case it was held that the fact that a person who had improperly propounded a testamentary paper was a nude executor was no ground for relieving him from his liability to condemnation in costs. If the Court follows that case then the decision of Wright J. was correct. In *In re Speke* (3), in which the executors were condemned in costs, if the first proviso had any application to the case it would have been referred to.

Here the executors knew that the codicil was made after the testator had had a stroke, and ought therefore to have made inquiries.

[They also referred to *Turner* v. *Hancock* (4); Annual Practice, 1925, p. 1305.]

*Eastham K.C.* in reply. Under Order LXV., r. 1, an executor cannot be deprived of his costs unless he has acted unreasonably. The respondents did not obtain a finding from the judge that the executors had acted unreasonably in propounding the codicil. No charge of misconduct or negligence was made against them at the trial nor was the judge asked to find that they had been guilty of misconduct or negligence. He therefore had no discretion to deprive them of their costs. Unless it is shown that an executor has acted unreasonably his right to costs is one that the Court ought to protect.

*Cur. adv. vult.*

March 10. The following written judgments were delivered:—

(1) [1902] P. 92.
(2) L. R. 1 P. & M. 118.
(3) 30 Times L. R. 73.
(4) (1882) 20 Ch. D. 303.

LORD HANWORTH M.R. stated the facts as above set out and continued: It is plain from the transcript of the proceedings that the learned judge intended to act upon the latter proviso to r. 1 of Order LXV., and, in accordance with the general rule, to allow the costs to follow the event—the issues upon the codicil being treated as the event. The attention of the learned judge does not appear to have been called to the earlier proviso in the rule. The practice as to costs in the Chancery and Probate Divisions was not considered.

The case seems to have been treated as subject to the ordinary rules applicable to the King's Bench Division, without any attention being paid to the different practices referred to in Order LXV., r. 1, or to the distinctions which mark a probate suit from an action tried by a judge and jury in the King's Bench Division. The case is therefore one to which s. 49 of the Judicature Act, 1873, restricting appeals on the questions of costs, does not apply. This view appears to accord with that of Wright J., who extended the time for an appeal to this Court from his judgment.

The questions raised and discussed upon the appeal must therefore be considered and determined upon their merits, as at the trial.

Before entering upon the difficult points that arise it is well to clear the ground by stating what appear prima facie to be the rights of the parties upon the issues decided by the verdict of the jury.

First, it appears that the plaintiffs have established the validity of the will, to the proof of which in solemn form they were compelled by the action of the defendants. They have also made good their position as executors of this will. It appears clear therefore that such costs as they have been put to in bringing the action to secure these results ought to be paid to them by the defendants. The order of the learned judge, however, gave the general costs to the defendants, and only gave the increased costs upon the issue of the due execution of the will to the plaintiffs.

Secondly, the defendants succeeded upon two and failed

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upon one issue as to the codicil. The learned judge has ordered the costs of the resulting event as to the codicil to be paid by the plaintiffs to the defendants, and in default of such payment of them, then that the defendants are entitled to receive them out of the estate. This order appears to be based upon the view that the plaintiffs ought not to have propounded the codicil, or at least to have abandoned this issue upon the appearance of the defence and substance of the case. It takes no account of the fact that the defendants raised one issue as to the codicil unsuccessfully.

Order LXV., r. 1, which applies in probate suits, leaves the costs of all proceedings in the Supreme Court to the discretion of the Court or judge, subject to the more specific directions to be found in the Acts and the rules themselves. The first proviso to this general direction contains a specific direction that "nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

Now, according to the rules hitherto acted upon in the Chancery Division, it seems clear that an executor who successfully established a will and his own position as executor —that is the position of the plaintiffs here—would have been entitled prima facie to his costs—that is his costs as between solicitor and client—out of the estate—"these rights resting substantially upon contract can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract": see per Jessel M.R. in *Turner* v. *Hancock* (1): and see also *In re Beddoe* (2); and per Swinfen Eady M.R. in *In the Estate of Barlow.* (3)

Further, the terms of the rule appear to throw the onus of depriving a trustee or executor of his costs out of the

(1) 20 Ch. D. 303, 305. (2) [1893] 1 Ch. 547, 555.
(3) [1919] P. 131, 132.

estate upon those who contest this right: see *In re Love* (1), a case which strongly illustrates the trustee's right, and that he cannot be deprived of it, unless a case of misconduct is made out against him.

In *Twist* v. *Tye* (2) Gorell Barnes J. (as he then was) states the rules applicable to probate cases. The general rule is that costs should follow the event, unless there is reason for departure from that rule. He mentions two classes of cases where there is such reason: the first, where the litigation has been brought about through the conduct of the testator; the second, where the parties who have failed have reasonably been led into the litigation by a bona fide belief in their case, and have, therefore, felt it desirable to inquire into the testamentary dispositions of the testator. This statement of the two classes is taken from the judgment of Sir James Wilde (afterwards Lord Penzance) in *Mitchell* v. *Gard* (3), and I think that in both the relief suggested is intended to be given by an order for payment of the costs out of the estate. Gorell Barnes J.'s judgment in *Twist* v. *Tye* (2) thereafter is devoted, in the main, to an examination of the facts of the case, in order to determine whether it fell within either of the two classes defined as above. He distinguishes the case from *Boughton* v. *Knight* (4), where Sir James Hannen had ordered costs on both sides to be paid out of the estate, because Sir James thought that the party who failed was honestly led into the litigation, and as executor named in the will had been justified in bringing the case before the Court. These two cases are illustrations of the above rules, though upon the facts one fell on one side of the line and the other upon the other side. Now, here the executors have, as I have already pointed out, succeeded as to the will, and established their executorship, and in the matter of the codicil won on the issue of undue influence. Their good faith has not been challenged. They may well claim, in their position as executors, "that they felt it desirable to inquire into the testamentary dispositions of the testator" under the codicil.

(1) (1885) 29 Ch. D. 348.
(2) [1902] P. 92.
(3) 3 Sw. & Tr. 275, 278.
(4) L. R. 3 P. & M. 64.

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There is, in my judgment, much to be said for the view that the litigation has been brought about by the conduct of the testator; but if there be a doubt as to that, I cannot hesitate to say that the executors bona fide felt it desirable to inquire into the codicil, and thus that their case falls within the second class enunciated by Gorell Barnes J.

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Sir James Wilde, in the case above quoted, continues (1): "I am aware that there are many cases to be found in which costs have been granted out of the estate under circumstances different from those that I have predicated. I am aware also that in some cases a less liberal view than I have taken of the conduct of parties pleading undue influence and fraud has prevailed; but there are cases to be found pointing both ways. I have sought in vain in the authorities of the Prerogative Court, and especially in the reports of the Judicial Committee, for anything like a general classification or rule." Sixty years have passed since those words were written, but they apply with equal force to-day. Probably the reason is that on questions of costs so much depends upon the exact facts of the case upon which the discretion of the judge is exercised, that specific rules are not deducible, and cannot be laid down. It may well be that this is fortunate, and not unwise. On questions of costs it is right that the latitude left to the judge who tries the case should be wide. Thus Order LXV., r. 1, opens by putting the decision as to the costs in the sphere of the discretion of the judge, and the two provisos revoke that discretion only to the extent prescribed in them.

Sir Gorell Barnes P. in *Spiers* v. *English* (2) substantially repeated his statement of the rules as in *Twist* v. *Tye* (3), but did not consider that the case fell into the exceptional cases. In *Page* v. *Williamson* (4) he treated *Twist* v. *Tye* (3) as having laid down the principles to be followed.

We have had our attention called to a number of cases illustrating their application, but I do not find that they alter the rules already stated. They only show the views

(1) 3 Sw. & Tr. 275, 278.
(2) [1907] P. 122.
(3) [1902] P. 92.
(4) 87 L. T. 146.

taken of particular facts and conduct—views not always following an undeviating line. In *Levy* v. *Leo* (1) Lord Mersey, when President, in circumstances not widely different from the present, ordered the costs of both parties to come out of the estate except the costs of the plea of undue influence, which failed: those costs he ordered to be paid by the party who failed on that issue, in accordance with the view expressed by Sir Gorell Barnes in *Spiers* v. *English* (2), that a plea of undue influence ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it. Such grounds did not exist in the present case, and the plea was withdrawn. The defendants must therefore pay those costs to the plaintiffs. Following the rules stated above, in my judgment the right order will be that the appellants take their costs of the action as between solicitor and client out of the estate, of course giving credit for any costs which they receive from the respondents as hereinafter ordered. The respondents must pay to the appellants their costs as between party and party of the proof of the will in solemn form and also the costs of the issue as to undue influence in relation to the codicil. The respondents are to have out of the estate their general costs of the action as between party and party, other than their costs of the proof of the will in solemn form and other than their costs of the issue of undue influence in relation to the codicil.

As to the costs of the appeal, the appellants will be at liberty to take their costs as between solicitor and client out of the estate. There will be no order as to the costs of the respondents upon the appeal in view of the fact that the appeal has been due—in part at any rate—to the fact that the appellants did not call the attention of Wright J. sufficiently to the first proviso to r. 1 of Order LXV.

SCRUTTON L.J. This is a difficult and troublesome case. It is an appeal from a decision by Wright J. as to how the costs of a probate action tried at the Liverpool Assizes should be borne. When the matter was mentioned to him

(1) (1909) 25 Times L. R. 717. (2) [1907] P. 122, 124.

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at Liverpool no counsel familiar with probate practice was present, and no probate authorities were cited to the learned judge. When the matter was again mentioned to him in London the learned judge treated the matter as entirely governed by the last part of r. 1 of Order LXV., that in actions tried by a jury, the costs should follow the event, unless the judge for good cause otherwise ordered, and did not consider either the probate authorities as to "good cause" or the early part of Order LXV., r. 1, as to preserving the rights of an executor according to the practice of the Chancery Division.

The action was by two executors propounding a will and codicil, in neither of which they had any pecuniary interest. The widow and daughter of the deceased, who had entered a caveat, denied the due execution of both will and codicil, alleged that at the date of the alleged execution of the codicil the testator was not of sound mind, and also that the codicil was obtained by undue influence of certain named persons. At the trial the execution of the will was proved; the jury found that the testator was not of sound mind at the time of the execution of the codicil; and the charge of undue influence was withdrawn. Thereupon, the judge gave the defendants their costs, including the general costs of the action, against the plaintiffs, or in default of payment by them, out of the estate, except in so far as these costs were increased by proving the due execution of the will in solemn form, which increased costs as between solicitor and client were to be paid by the defendants to the plaintiffs. Nothing was said about the costs of the issue of undue influence. The plaintiffs appealed against the order as to costs, and asked that the costs of the issues of undue influence and the execution of the will should be paid them by the defendants, and that all other costs of both parties should be paid out of the estate. The defendants took the objection that the appeal was as to costs only, but in my view the learned judge was mistaken in limiting his consideration of the matter to the concluding words of r. 1 of Order LXV.; and as he erred in principle his decision is open to appeal, in which this Court has to apply the proper principles as a judge of first instance.

First, as to the costs of the executors in proving the will. Order LXV., r. 1, in leaving the costs to the discretion of the judge, and providing that in jury cases costs follow the event unless good cause is shown, is subject to the proviso that the rule is not to deprive an executor of any right to costs out of a particular fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division. Now, an executor in an administration action in the Chancery Division would get his costs as between solicitor and client of any action necessary to prove the will of which he was executor. As Cotton L.J. says in *In re Sarah Knight's Will* (1): "Trustees are entitled to their costs unless they have been guilty of misconduct." Lindley L.J. in *In re Beddoe* (2) states the settled practice of the Court of Chancery as being to give the trustee full indemnity out of the trust estate against all costs and charges not improperly incurred. This the executor would get without any order of the Court, and the Court cannot make any order depriving him of such costs. But the Court may protect the estate by ordering the unsuccessful party in the first instance to pay such costs taxed as between party and party, in which case if the executor cannot recover them from the defendant, he should get them from the estate, and anyhow get the excess of solicitor and client over party and party costs from the estate. The learned judge has only given the executors here the increase of costs occasioned by denying the execution of the will, the general costs going to the defendants. This is in my opinion contrary to the rights of executors in the Chancery Division. The executors would be entitled there to the costs of a successful action limited to proving the will in solemn form; the defendants who failed should pay the party and party costs of this, leaving the executors' right to recover such part of the whole of such costs as between solicitor and client as they did not receive from the defendants from the estate.

Next, as to the costs of the issue of undue influence which the defendants abandoned at the trial. They had apparently

(1) 26 Ch. D. 82, 92. (2) [1893] 1 Ch. 547, 558.

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no reasonable ground for raising this issue, and must pay the costs of it: see *Levy* v. *Leo* (1); *Oldcorn* v. *Tenniswood.* (2)

So far, there is not much difficulty, but there remains the difficult question of the costs relating to the codicil, which the executors of the will did not succeed in proving. The general practice of the Probate Division has been stated by Lord Gorell in *Spiers* v. *English* (3), following the decision of Lord Penzance in *Mitchell* v. *Gard* (4), and his own decision in *Twist* v. *Tye.* (5) Lord Gorell states the general rule to be that costs follow the event, unless the case can be brought within one of two classes of facts. The first is where the testator himself or the persons interested in the residue have been the cause of the litigation, in which case the costs of both sides may be ordered to come out of the estate. The second is where "the circumstances lead reasonably to an investigation of the matter," in which case Lord Gorell says in *Spiers* v. *English* (3), "the costs may be left to be borne by those who have incurred them." Lord Penzance (6) relieved the unsuccessful party of costs, if the suit was justified by reasonable and sufficient grounds for doubt. Neither judge in this class of case gives the costs out of the estate. Lord Gorell in *Page* v. *Williamson* (7) refused to relieve two executors of costs who failed in propounding a will of which one was residuary legatee, and added: "The rule is that costs follow the event, and there is no departure from it in this Court any more than in any other Court, unless under rare and exceptional circumstances." I should be reluctant to do anything to create the idea that unsuccessful litigants might get their costs out of the estate, without making a very strong case on facts. The lure of "costs out of the estate" is responsible for much unnecessary litigation. But I notice that Lord Mersey when President of the Division was inclined to give costs out of the estate in cases in which Lord Gorell would apparently merely have relieved the unsuccessful party of the liability to pay costs: see *Levy* v.

(1) 25 Times L. R. 717.
(2) (1909) 25 Times L. R. 825.
(3) [1907] P. 122, 123.
(4) 3 Sw. & Tr. 275.
(5) [1902] P. 92, 94.
(6) *Mitchell* v. *Gard*, 3 Sw. & Tr. 275, 278.
(7) 87 L. T. 146, 147.

*Leo* (1), in which case, however, the judge knew, when he gave costs out of the estate, there was no estate left for the costs to come out of: *Oldcorn* v. *Tenniswood* (2), where the unsuccessful defendant got costs out of the estate.

There appear to be very few reported cases where the executor of a valid will fails to prove an invalid codicil. An executor of the estate under the will, he is obviously embarrassed in the administration so long as the validity or invalidity of the codicil is not determined, and one would think there ought to be some procedure by which he might call the attention of the Court to the existence of such a document without involving himself in responsibility for costs.

But in *Rennie* v. *Massie* (3), an executor of a will with a codicil who had no interest in either propounded both, and failed as to the codicil. Lord Penzance said that an executor is not bound to propound a will or codicil if he does not like it, and if there is a case of doubt should get security for costs from the parties interested under it, in this case, Norah Faulkner. He ordered the executor to pay the costs. In *In re Speke* (4) Bargrave Deane J. was very vigorous in ordering an executor, who disputed the execution of a codicil produced under curious circumstances, to pay the costs.

In this state of the authorities, what are the facts of the present case?

The testator, a married man with children, had quarrelled with his wife, and was living with a mistress, Norah Faulkner. He had left her in his will the house in which they were then living, but that house had been sold. On January 2 the two were living at the house of a Miss Clews, the secretary and mistress of a Mr. Banville, another married man. On that day the testator had a stroke. On January 3 Norah Faulkner telephoned to the solicitor who had prepared the will to come. He came on January 5 with Mr. Banville. On that day the testator, who was an educated man, could not write, could not see, and could hardly speak; but with his hand held, a mark was put to a codicil giving about 1400*l.* of

(1) 25 Times L. R. 717.
(2) 25 Times L. R. 825.
(3) L. R. 1 P. & M. 118.
(4) 30 Times L. R. 73.

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property to Norah Faulkner. There was conflicting evidence as to how far that day he was capable of understanding what he was doing. The will was witnessed by the solicitor and Banville. Judicial proceedings were pending between himself and his wife, and earlier on that day the solicitor had written to the wife's solicitors, who were pressing for an affidavit of means, that the testator was not allowed to see any one and was incapable of attending to any business. The jury found that the testator was not of sound mind to make a will. The conduct of the solicitor and attesting witness was obviously very unsatisfactory. As to the executors, one of them knew nothing about the matter; the other was an employee of the testator, and must have known he was seriously ill. But he had brought to him a codicil witnessed by a solicitor who had prepared the will, and a power of attorney witnessed by a doctor, who yet gave evidence at the trial as to the incapacity of the testator. This executor, however, had before him when the litigation was started the letters of the solicitor stating the incapacity of the testator to attend to business.

On this state of facts I regard the question of costs as a difficult one. It appears from the decision of this Court in *In the Estate of Barlow* (1) that the innocent executor must suffer for the fault of an executor more affected with knowledge; and I notice that Lord Cozens-Hardy M.R. in *In re Jeffries* (2), in ordering an executor, not a party to the forgery, who propounded a forged will, to pay the costs, was doubtful as to the position of an executor who put forward the will of a person found non compos mentis: "in a case such as that the executor might get his costs." I am also influenced by the fact that the learned judge who tried the case thought there was no reason to protect the executor.

I have come to the conclusion that the proper order to make is not to order the executors to pay costs, but not to give them their costs out of the estate. I do not comment on their liability to pay costs to their solicitor, as I have not heard him, but it may be strongly argued that he is the

(1) [1919] P. 131. (2) (1916) 33 Times L. R. 80, 81; [1916] W. N. 394.

person really responsible for this litigation. As to the defendants, except as already mentioned, they should have their costs of the action out of the estate, which they have protected. There should in my opinion be no costs of this appeal. But as my brothers think differently, the order will of course be as proposed by the Master of the Rolls.

SARGANT L.J. The executors of the will of the testator are appealing against that part of the order of Wright J. which deals with the costs of an action in the Probate Division, which was heard before him and a common jury at the last Liverpool Assizes. The executors claim that they are entitled to costs out of the estate under the first proviso to r. 1 of Order LXV., and it is clear that any right they may have to such costs is a proper subject matter of appeal if the proviso is applicable. It is also clear that, when the question of costs was discussed before the learned judge, this proviso to the rule was never insisted on or brought to his attention. The whole discussion took place in relation to the second proviso to the rule, which is of a totally different character, and if applicable would throw the onus of establishing their right to costs on the executors, while the first proviso throws the onus on those who seek to deprive the executors of their costs. The question, therefore, in this Court is res integra, and we have to determine the matter entirely afresh and apart from any guidance by the learned judge.

That the prima facie right of trustees to costs is of a very definite character is illustrated by the decision in *Turner* v. *Hancock* (1), where it was held that, inasmuch as the right was contractual, it was not within the general terms of the discretion as to costs given by the Rules of 1875; and though the terms of the present rule are more specific, and undoubtedly give the Court jurisdiction as to these costs, nevertheless the language of the first proviso renders it clear that executors, administrators, trustees and mortgagees are not to be deprived of any costs out of an estate or fund to which they would have been entitled according to the rules then acted on

(1) 20 Ch. D. 303.

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by the Chancery Division, unless they have unreasonably instituted or carried on or resisted any proceedings. It was accordingly held in *In re Love* (1), that a trustee who had been guilty of no misconduct was entitled to costs as between solicitor and client, even though it might result in two sets of such costs being allowed. And in a case where the estate was insufficient the executor was given priority for his costs, charges and expenses in an action for administration : *In re Middleton* (2), a case under the Rules of 1875.

It was not contended before us that the rule in question did not apply to probate actions, and, indeed, the contrary appears to be recognized in Tristram and Coote's Probate Practice, 15th ed., p. 522, and to be implied in *Twist* v. *Tye*. (3) I doubt whether much is to be gained by considering the way in which costs have been awarded in a number of probate actions where the facts are widely different ; and nothing is to be gained from cases where the executors named in a will have failed to establish the will, for in such cases they are not executors and have no contractual or quasi contractual rights : see *In the Estate of Barlow* (4), and compare *Ex parte Russell*. (5) The only case which has been cited to us as one in which since the present rule an actual executor has been deprived of costs is *In re Speke* (6), but there the conduct of the executors was held by the judge to have been thoroughly unreasonable, inasmuch as, without the least material to go on, they opposed the proof of a duly executed codicil.

In the present action it was admitted by counsel for the defendants before Wright J. that no charge of misconduct or negligence was made against the plaintiffs as executors, nor was any suggestion to that effect made in the course of the evidence. No doubt at the time no attention was being paid to the first proviso to the rule now in question ; but this fact cannot weaken the force of the admission, which by itself is, in my judgment, sufficient to entitle the appellants

(1) 29 Ch. D. 348.
(2) (1882) 19 Ch. D. 552.
(3) [1902] P. 92.
(4) [1919] P. 131.
(5) 19 Ch. D. 588.
(6) 30 Times L. R. 73.

to succeed in their appeal. Inasmuch, however, as the facts of the case have been discussed at some length before us, I will also deal shortly with the general question of the conduct of the executors.

The testator had a wife and family, some of whom were grown up and out in the world; but he was living apart from his wife with a mistress, one Norah Faulkner, by whom he had one child. By his will dated April 24, 1924, in which the plaintiffs were named as executors, he had made no provision at all for his wife, but had left the house in which he was living, and which belonged to him, to Norah Faulkner, with its contents. The rest of his property was absorbed by a legacy of 2000*l.* to his putative child, and by two annuities of 300*l.* each to his family, the precise details of which have not been gone into before us.

After the date of his will the testator sold the house in which he had been living, and thereby adeemed his gift of it in favour of Norah Faulkner; and by a codicil dated January 5, 1925, he purported to bequeath a sum of 1000*l.*, being about the value of the house, to Norah Faulkner. At the date of this codicil the testator was undoubtedly very ill, and it purported to have been signed by him by a mark only. But one of the witnesses to the execution was a solicitor named Myers, who had previously acted for the testator for twenty-five years; and the contents of the codicil were not unreasonable in the circumstances. The testator lived some three months after the date of the codicil, and during that period, while he could not carry on business himself, his affairs were in fact conducted under a power of attorney, which was executed on the same day as the codicil. In this state of things there was little, if anything, to cause the executors, who were, in the usual course, employing Myers as their solicitor in the administration, to look with any greater suspicion on the codicil than on the will itself.

On coming to prove the will and codicil in the ordinary way the executors found that a caveat had been entered against both the will and codicil, though so far as the widow was concerned, she had no interest in opposing the latter,

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unless she could first succeed in her opposition to the former; and it therefore became necessary to proceed to proof in solemn form of the will at least. Was it unreasonable for the executors to adopt the same course with regard to the codicil also? I cannot think it was. Assuming that the Court pronounced for the will, as was ultimately the case, it would nevertheless have been impossible for the executors to wind up the estate until some determination had been arrived at as to the validity of the codicil. In my judgment, the obvious practical course for the executors to adopt was to propound both the will and the codicil for proof in solemn form.

It is suggested that the executors should have suspected Myers and have made an investigation themselves, which would have resulted in discrediting the codicil. Whether any such investigation could have been made fruitfully I feel great doubt, and I see little if any ground, on the facts then known to the executors, for suspecting Myers, who had so long acted for the testator, and who was not himself benefiting under the codicil. No doubt great discredit was thrown on Myers as the result of the evidence at the trial, but this is a totally different matter; and blame cannot in my view attach to the executors for not being wise till after the event. In any case this omission on the part of the executors cannot in my view amount at the most to more than an error of judgment in a difficult situation, and such an error of judgment is not enough to justify the Court in depriving the executors of their costs.

I agree as to the order as to costs which has been formulated by the Master of the Rolls.

*Appeal allowed.*

Solicitors for appellants: *Rawle, Johnstone & Co., for J. Ogden Hardicker & Hanson, Manchester.*

Solicitors for respondents: *Cunliffe, Blake & Mossman, for Edward Lloyd, Liverpool.*

W. I. C.

DIVORCE.

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*March* 15, 19;
*April* 19.

## BOSWORTHICK *v.* BOSWORTHICK.

*Divorce—Variation of post-nuptial Settlement—Guilty Husband—Bond by Wife to secure present Payment to Husband of Annuity—Appointment by Wife to Husband of Annuity payable after her Death—Bond discharged—Annuity postponed to any Life Interest appointed by Wife to any future Husband—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Judicature* (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

A post-nuptial provision for his life made by a wife for her husband by a bond, or by the exercise of her power of appointment, giving him an annuity for his life expectant upon her death, are post-nuptial settlements within the meaning of the Matrimonial Causes Act, 1859, s. 5, and the Judicature (Consolidation) Act, 1925, s. 192, and give rise on the dissolution of the marriage to the power of the Court to vary the settlements.

Dictum of Sir Francis Jeune in *Chalmers* v. *Chalmers* (1893) 68 L. T. 28 not followed.

A WIFE, married in 1897 and possessing a life interest in considerable property under a settlement made by her uncle and his will, by a bond, dated December 23, 1902, secured to her husband an immediate annuity for life of 300*l.* a year, and by a deed poll, dated January 30, 1903, appointed to him a reversionary annuity, expectant on her death, of 600*l.* a year. On January 12, 1925, the marriage was dissolved on the wife's petition on the ground of her husband's adultery. The wife now petitioned for an order extinguishing her liability under the bond and her husband's interest under the appointment. There were some arrears due to the husband under the bond.

The Court held that both instruments were post-nuptial settlements within the meaning of the statutes, and made an order extinguishing the wife's liability under the bond, subject to payment of the arrears, and postponing the interest of the husband under the appointment to any life interest which the wife might appoint to any after taken husband.

The registrar had reported that the appointments by the wife were not post-nuptial settlements within the meaning of the Acts.

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*Hewitt K.C.* and *F. L. C. Hodson* for the husband moved to confirm the report.

*Hawke K.C.* and *J. L. Pratt* for the wife. The registrar was wrong as to both of the transactions. As to the bond, the transaction is in effect a settlement, though there were no trustees. Trustees are unnecessary since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 1. There is no substantial difference between the deed of separation with a sum payable under it to a wife in the character of a wife and a bond given to a husband as a husband. Deeds of separation are variable: *Worsley* v. *Worsley* (1); *Jump* v. *Jump* (2); *Clifford* v. *Clifford*. (3) The cases of *Chalmers* v. *Chalmers* (4) and *Hubbard* v. *Hubbard* (5) are distinguishable, because they were final assignments. The payment in this case is for a limited period. As to the deed poll the respondent has ceased, on account of his conduct, to be the husband of the petitioner. The Court has power to vary the instruments accordingly, and the petitioner ought to be in a position to appoint to an after taken husband. As to the arrears under the bond the respondent has no claim to them now, and the order of the Court can be retrospective in extinguishing his right to them. On this point *Paul* v. *Paul* (6) is distinguishable.

*Hewitt K.C.* for the husband. Neither of these instruments was executed upon a marriage or can be reasonably called a settlement. The marriage took place in 1897, and the bond, dated in 1902, cannot be construed as a settlement on that marriage.

[THE PRESIDENT. At all events an annuity is secured by it to the husband during his life.]

*Worsley* v. *Worsley* (1), cited against me, is distinguishable. It is there said: "The substance of the matter is, that the Legislature by this section has armed the Court with authority to make special arrangements in the case of a woman . . . . in reference to property settled upon her in her character

(1) (1869) L. R. 1 P. & M. 648.
(2) (1883) 8 P. D. 159.
(3) (1884) 9 P. D. 76.
(4) 68 L. T. 28.
(5) [1901] P. 157.
(6) (1870) L. R. 2 P. & M. 93.

as a wife." In this case the bond is to the respondent absolutely and not as husband. In *Jump* v. *Jump* (1) the deed of separation was the reverse of a marriage settlement, in that it created an absolute assignment. That case was on the same footing as *Chalmers* v. *Chalmers* (2), which is undistinguishable on that point.

The case to be considered is one in which the wife makes a present of an annuity. So in *Hubbard* v. *Hubbard* (3), where even if the form was that of a settlement, the actual transaction was a deed of gift, and therefore not within the section. Moreover the characteristics of a settlement are missing. There were no successive estates. But the notion of a settlement requires successive estates.

As to the deed poll. The appointment of a reversionary life interest is not a settlement. The interest created by the deed poll only accrues to the respondent on the death of the petitioner. And the suggested variation, even if it is a settlement, is no benefit to the petitioner, which is a necessary ingredient of the jurisdiction: *Thomson* v. *Thomson*. (4) The benefit would be that of her relations, who are not within the scope of the statutes.

*Hawke K.C.* in reply.

*Cur. adv. vult.*

April 19. THE PRESIDENT (LORD MERRIVALE). This was a petition, after a decree absolute for dissolution of marriage, for a variation of what were alleged to be post-nuptial settlements. The wife was the petitioner in the suit, and this was the wife's application. The marriage took place in 1897. It is, perhaps, not immaterial that the parties then were in middle life, the wife aged forty-three, the husband somewhat younger. The wife was a woman of substantial means. Under a settlement made by her uncle, Mr. Clegg (which I shall call for the purpose of this judgment "the uncle's settlement")—a settlement made in 1894—the wife had a valuable life interest, a life interest evidently amounting

(1) 8 P. D. 159.
(2) 68 L. T. 28.
(3) [1901] P. 157.
(4) [1896] P. 263.

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to a very substantial sum. That is quite clear from the facts, and under the will of the same uncle the wife became entitled to further benefits which were settled upon her. Trustees were interposed, both under the deed of settlement and under the settlement in her uncle's will, and the wife had, under the uncle's settlement and under his will, a life interest in the funds which were settled, with remainder to her children, if any, and with power to appoint to any husband who might survive her an interest for his life or any less term in the specified fund or any part of the fund, such life interest to take effect upon the death of the petitioner, the wife. The uncle died in the year 1900, and in December, 1902, and January, 1903, the wife, the petitioner, made certain dispositions in favour of the respondent, her then husband. On December 23 she executed a bond to secure to her husband payment of 300*l.* a year, payable quarterly. There was no other consideration for that agreed annuity than the relationship of husband and wife between the parties. On January 30, 1903, five or six weeks later, the wife exercised her power of appointment, a power of appointment which she had over the trust funds settled by her uncle, and she exercised it by deed poll, which provided that after the death of the petitioner, her husband as he then was should be entitled to an annuity of 600*l.* a year out of the income of these settled funds. There were certain limitations, which it is not necessary to consider here, with regard to determining the interest of the husband in the event of his insolvency or any process of alienation of his annuity. There were no reciprocal settlements by the husband, and the petitioner says, and it seems to be the fact, that he did not at any time during the married life of the parties contribute to her support. Apparently in 1924 he was unfaithful to his conjugal obligations. On January 12 of last year the marriage was dissolved on the ground of the respondent's adultery, and in due course, after the decree of dissolution of marriage, the wife presented her petition, which is now in question, and thereby sought a decree which should extinguish her liability under her bond

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and extinguish the interest created by the deed poll of an annuity to the husband out of the uncle's trust funds. Perhaps I ought to say there are arrears of the annuity under the bond for 300*l.* a year which have accrued from the end of 1923 until the present time, and one question before the registrar, and a question which was mentioned before me, was what, if anything, ought to be done in respect of these arrears.

The jurisdiction of the Court in matters such as are here in question arose under the Matrimonial Causes Act of 1859, a jurisdiction which is now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. Everybody who is familiar with the authorities bearing on this subject will, I think, be conscious that it was something of a surprise to some people when the Divorce Act of 1857 came into operation to find that although the marriage of parties had been dissolved pecuniary interests of which the basis was their marriage remained in being. The Act of 1857 had provided for dispositions by the order of the Court of funds belonging to a wife, but it had made no provision with regard to settlements the basis of which had gone, and no other provision than that empowering the Court to deal with the property of an unfaithful wife. It was very soon realized that although a marriage had been dissolved, the marriage settlement continued in force, with the result that the guilty party in a divorce might remain entitled to funds settled upon him or her in the capacity of husband or wife, either for the gratification of that party or even for the maintenance of a second husband or a second wife, as the case might be, which seems a little incongruous to common sense, as we now view things. Of course, what must be borne in mind here is this, that the statute which created the power to vary ante-nuptial or post-nuptial settlements dealt with a state of things in relation to the property of married women and in relation to the relative rights of the husband and wife, which has been wholly transformed since 1859 in an almost revolutionary way.

When it is stated here that the wife had secured an income

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for her husband by bond, and that the wife had appointed for her husband's benefit, in the event of his surviving her, a life interest in settled properties over which she had control, and it is realized that the relationship of husband and wife upon which those benefits proceeded had been determined, it seems the most natural thing in the world to imply that the benefits should be determined. But the result of the old authorities, both at law and in equity, is to show that except so far as those benefits may be determined or varied under the provisions of the statute of 1859, and subsequently of the Amending Act, which cleared up some of the questions as to the extent of those provisions, they cannot be varied or determined. So, learned argument was necessary, and the Court had the advantage of learned argument on this application, to determine whether the bond given by the wife to her husband in December, 1902, is a post-nuptial settlement —of course if it is not a post-nuptial settlement it cannot be varied—and to determine with regard to the appointment by the wife of an interest to the husband under her uncle's trust fund in January, 1903, whether the power of variation provided by s. 5 of the Act of 1859, re-enacted by s. 192 of the Act of 1925, extends to this case. With regard to variations of settlements the Court has power to direct the application of all or part of the property settled for the benefit of the parties or for the children of the marriage. In this case there are no children; the petitioner has herself the whole income of the settled fund, out of which the husband's annuity is appointed, to take effect upon her death; and the remainder or subsequent trust after the wife's life interest is a trust in favour of other relatives of the settlor. So it was said the remainder by the resulting trust, the ultimate trust in the funds, being a trust which is subject to a life interest, nothing can be done in her favour under the powers of the statute; you cannot give her more than the whole, it is a life interest alone which is in question, and it is said that the statute does not contemplate the advancement of parties other than parties to the marriage. Those questions were very capably discussed.

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First of all as to the bond, with its provision for an annuity of 300*l.* a year payable quarterly to the husband, it was said by learned counsel on behalf of the respondent that there is a contrast between such an instrument and what commonly is regarded as a marriage settlement. It is not difficult to make the contrast. There was no declaration of trust, there was no specified property, there were no trustees, and there were no successive interests; and irrespective of the provisions of the Matrimonial Causes Act, 1859, it was asked with some confidence, how can this instrument be described as a settlement? It was compared with a promissory note and various other choses in action, and it was said it took immediate effect, and that at any rate it was not a settlement within the provisions of the statute, and it was said quite truly that no case could be produced where a bond such as this was for securing an annuity had been declared by the Court to be a settlement.

Some well known authorities were dealt with by distinguishing this instrument from the assurances in the law which were there under consideration, and it was said there was no identity between them. That was clear enough. There were cases where a long succession of decisions had determined that a separation deed with a covenant for an annuity is a settlement. One case had determined very early in the history of the administration of the Act of 1859 that a covenant for an annuity is a settlement. I am not sure whether those cases were accepted by respondent's counsel as of authority at the present time, because a dictum of Sir Francis Jeune in the case of *Chalmers* v. *Chalmers* (1) was relied upon, where, in argument, he is reported to have said this: "Supposing the wife made the husband a present of an annuity, that would not be a settlement." It was suggested that I must treat that as being directly in point. I am not quite sure that it was so precisely in point as was suggested. If the wife had been making a present of an annuity in 1859, which is the material time at which we are to consider what the Act of 1859 meant, the instrument by

(1) 68 L. T. 28.

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which she would have done it would have looked so much like a settlement that there would have been some difficulty in accepting the dictum of a learned judge as proof that that did not constitute a settlement. I am not quite satisfied about the dictum—whether it did in fact fall from the learned Judge President, Sir Francis Jeune. I say that, not because of any doubt as to the excellence of the reports by the gentlemen who were then reporting for the Law Times, but because the authority to which Mr. Hewitt referred, a direct authority as to the effect of the gift and as to whether it can be deemed to be a settlement, is a case in the Court of Appeal upon an appeal from a decision of Sir Francis Jeune; and Sir Francis Jeune in *Hubbard* v. *Hubbard* (1), having to deal with an assignment of leasehold property, an absolute assignment which a husband had made during the marriage in favour of his wife, found that that assignment was a settlement. The grounds upon which it was so found are not stated, but the Court of Appeal examining the transaction—an absolute assignment of leasehold property to trustees for the immediate benefit of the wife—said a deed of gift is not a settlement. *Hubbard* v. *Hubbard* (1) does not help at all in the decision of this case. There is no absolute deed of gift here, nothing of the kind, nothing which resembles the disposition which was made in *Hubbard* v. *Hubbard*. (1) I associated it with *Chalmers* v. *Chalmers* (2) because that case was referred to in *Hubbard* v. *Hubbard* (1), and that expression which is attributed to the learned judge was dwelt upon, and, as I say, I have great difficulty in supposing that Sir Francis Jeune, who was very familiar of course, and had long been familiar with the practice of the Court in all these matters, can have expressed himself quite so absolutely as appears in that passage in the report of *Chalmers* v. *Chalmers*. (2) It is not very material. The transaction here is not the transaction which was in question there, and the observation said to have been used arguendo does not further appear, and the subject is not discussed. It was taken up at once by learned counsel to whom it is said to have been

(1) [1901] P. 157. (2) 68 L. T. 28.

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addressed, and I think disposed of in whatever form it was uttered. It is necessary here to ascertain whether this bond to secure an annuity to a husband for the joint lives of the parties and the life of the husband if he is the survivor is a settlement. I have referred already with sufficient definiteness to the changed conditions under which the spouses must have dealt with their property in 1859 to indicate my view that it is a mistake to attach too much importance to the form of the transaction. It must be looked at to ascertain what it is and what in truth its elements are in point of law. It derives all its validity from the Married Women's Property Acts. Before the passage of the Married Women's Property Acts it would have been a mere nullity; the wife could not have contracted with the husband except by virtue of the Married Women's Property Acts. It is by those Acts deemed to be a transaction with regard to the wife's separate estate; it is a disposition of separate property which is good under the special provisions of the law which relate to married women, and it derives its efficacy from those special provisions. It is not immaterial to observe that there is a reported case of *Kane* v. *Kane* (1), where Hall V.-C. held that a bequest to a married woman for her life must be deemed to be a settled property. Take the Act of 1859 and forget for a moment the short road provided by the Married Women's Property Acts, and express this transaction in terms of the law as it stood when the Act of 1859 dealt with settlements, and the question whether this is a settlement has a great deal of light thrown upon it. If a married woman had been minded in 1860 to make an assurance with the effect of this instrument, her separate property would have been specified, trustees no doubt would have been named, and then the present and prospective interests in that property must have been dealt with. This bare bond with a penalty deals with none of them, but the fact to which I last referred shows what the character of the transaction is in the light of the state of the law with which the Act of 1859 was dealing. I ask myself: Does it matter, so far as the nature and effect

(1) (1880) 16 Ch. D. 207.

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of this assurance in the law is concerned, that the Legislature has provided a simple and ready means of carrying out that which before 1882 must have been effected by much more elaborate means? If this transaction were expressed in the terms of the law as it stood in 1860 I cannot doubt it would have been held to be a settlement, without reference to authorities. If a married woman having control in equity over property of her own—separate property—has disposed of that property, with the effect that during the joint lives of her husband and herself the husband had an interest, and during the survivorship of the husband he had an interest, and after the death of the husband there was a resultant trust or a remainder, I cannot doubt that it would have been deemed to be a settlement. When the substance of the matter is looked at, my view is, apart from any authority, that this is such a transaction as is aimed at by the terms of the statute of 1859, and that it is a post-nuptial settlement. It is therefore capable of variation.

I have to deal with the matter upon authority, because Mr. Hewitt quite justly argued that the express authorities do purport to deal with this particular case. But when I find that a wife has entered into an obligation, has executed an assurance in the law with the intent and with the effect of making a provision for her husband as her husband during their joint lives, and after her death a provision having regard to her separate estate, it seems to me this is a disposition of property which governs its prospective application during successive lives, and that I ought to hold that it is a settlement.

Perhaps I should add that I asked myself whether, suppose this had been done in contemplation of marriage, suppose on the day before the marriage the wife had made such an instrument as she made afterwards in contemplation of marriage and with no other consideration, could it have been said that it was not an ante-nuptial settlement? I do not propose to elaborate that subject, but it has some bearing upon the true effect of the transaction.

I will again say that I dealt with the matter on principle,

but looking at the authorities which were cited to me on behalf of the petitioner I could not help coming to the conclusion that if the cases which were referred to were rightly decided they throw a very strong light on this case, and have in their facts far less of the class of business which is done by settlement than the facts of the present case. There are a series of cases, all except one dealing with separation deeds.

The earliest case of all was a case in 1860, *Callwell* v. *Callwell*. (1) There a covenant for an annuity which was made in contemplation of marriage was held to be an antenuptial settlement. Quite true there were circumstances in the case which could be remarked upon. There were marriage settlements being made, and this covenant was made in association with marriage settlements. The decision was that a covenant for an annuity to the wife at the time of the intended marriage was a marriage settlement, and what was done by order of the full Court was to decree that the benefits which would have been benefits to the wife under that covenant should be appropriated to the children of the marriage. There is the case of *Gill* v. *Gill* (2) shortly afterwards, where there was a covenant by a third party in favour of the wife in contemplation of marriage. That provision was varied. Then in 1869 Lord Penzance dealt with the first of a series of reported cases. It was a case of a covenant in a separation deed, a mere covenant for provision for annual payments to the wife, first of all during the marriage, then upon the event of widowhood, and then upon remarriage, and the husband, the petitioner, after a decree obtained an order that the terms of that covenant should be varied. Lord Penzance said this: "What is in question is a sum of money agreed to be paid to a woman in her character as a wife." He held that it was property settled upon her as a wife, and dealt with it accordingly. *Sykes* v. *Sykes* (3), a year or two afterwards, was another decision of Lord Penzance. That was a case of an annuity provided by the husband's father in the event of the widowhood of the intended wife, a covenant in

(1) (1860) 3 Sw. & Tr. 259. (2) (1863) 3 Sw. & Tr. 359.
(3) (1870) L. R. 2 P. & M. 163.

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contemplation of marriage. Lord Penzance diverted that annuity from the wife, who had been divorced, and ordered it to be applied to the benefit of the husband and the children.

Sir James Hannen in *Jump* v. *Jump* (1) dealt with a separation agreement with a weekly allowance. He said that an annuity is a well recognized form of property. Sir James Hannen varied the amount of the annuity which was there in question.

The last case upon the subject, a matter which set the whole business at rest, as it seems to me, so far as separation deeds are concerned or agreements of separation, was *Clifford* v. *Clifford* (2), where in this Court Butt J. (as he then was) had refused an application to reduce the amount payable to the wife under a deed of separation after the decree of dissolution of marriage, and the Court of Appeal, in which Cotton L.J. was presiding, determined that the provision ought to be reduced. It was a mere covenant for an annuity to a woman made while the parties were separate, and no more. It is quite true in those cases there were trustees interposed. That was because the transactions took place when a married woman was not capable of contract with her husband. That is the only reason for the interposition of trustees. The substance of the matter in each case was that either the husband or some relative of the parties had made a covenant for a provision in anticipation of marriage or during the marriage, upon the event of separation, a covenant or agreement for payment of a periodical allowance. If those decisions stand, as it seems to me I must hold that they do stand, because two of them are decisions of the Court of Appeal, the full Court under the Act of 1857, and the Court of Appeal under the Judicature Act, it is impossible to say in view of the considerations which I have mentioned in respect of the effect of the Married Women's Property Act, 1882, that this bond for the payment of an annuity by the wife to the husband is not a post-nuptial settlement, I am bound to hold that it is.

The only other question is what the variation ought to be. The consideration for such provision has disappeared. It

(1) 8 P. D. 159. (2) 9 P. D. 76.

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was a provision by a wife for her husband. It seems to me, upon satisfaction of the arrears, the obligation of the wife under the bond of 1902 must be held to be discharged, and I so direct.

Now comes the question with regard to the appointment under the uncle's settlement. It is quite clear from the statute, and it has been made abundantly clear by decisions under the statute, that the variation of a settlement must be a variation for the benefit of the parties or the children of the marriage, and a variation which merely transfers the benefit from the guilty party to some stranger to the marriage contract is not such a variation as can be made.

The authorities to which reference was made were *Sykes* v. *Sykes* (1); *Thomson* v. *Thomson*. (2) It is quite clear that is the true effect of the statute. How does that affect this case? The wife at the present time is seventy-two years of age, and it was said, and is pointed out in the very careful report of the learned assistant registrar, that that affects the question of remarriage. So it does in a sense, but I must consider what interest the petitioner has under her uncle's settlement, and whether the appointment which she made in favour of the man who was then her husband can be or ought to be varied for her benefit. He has ceased to be her husband. It may be that she might desire to take another husband. The fact that she is seventy-two years of age has no conclusive weight in respect of that possibility. At any rate she must not be worse off in point of principle than if she were a younger woman. If she were twenty-two years of age nobody would suggest it was not a great benefit to be in a position to provide for an after taken husband, a husband about to be taken. It would be an advantage in negotiations for settlements. At her present age she may desire to remarry; I do not know, but if she desires to remarry at the present time she has no power, she has deprived herself, on the faith of her marriage to the respondent, of the power which she had whilst she was single, to appoint to an after taken husband, under the uncle's settlement. I cannot see

(1) L. R. 2 P. & M. 163. (2) [1896] P. 263.

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any ground in point of principle on which it should be held that she should be deprived of that right. It may never come into operation, but it seems to me the proper order with regard to the appointment made in favour of the respondent under the uncle's settlement, is that the petitioner shall be at liberty in the event of her remarriage to appoint to the intended husband an interest to take effect in priority to the interest appointed to the respondent by the appointment which she made in January, 1903.

That I think disposes of the questions in the case.

*Mr. Hewitt K.C.* said that only the question of jurisdiction had been raised and argued before the registrar or the Court, and the question what should be done if there was jurisdiction had never been argued.

After some discussion the President gave the respondent fourteen days within which he might apply to have the case restored for argument on this point.

No such application was made.

Solicitors for petitioner: *Law & Worssam.*

Solicitor for respondent: *C. R. A. Edmonds.*

J. R. B.

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*April* 19, 21.

## *In the Estate of* WHITE TODD.

*Testamentary Papers—General English Will—Special Will relating to American Assets—Separate Executors—Interdependence of Wills—English Probate of all Papers — Retention of sealed and examined Copy of American Will—Original American Will released for Probate in America.*

If testamentary papers are independent, one dealing exclusively with property within the jurisdiction and the other with property outside it, there is no obligation on a party propounding the first to obtain probate of the second. .The question is whether the papers are independent or interdependent.

A testator left two wills, one English the other American—the latter dealt exclusively with property outside the English jurisdiction—but the two documents were interdependent with regard to the residue, which was liable for English estate duty. The executors of the two wills were different persons. The testator had expressly directed that the American will should be "probated" in America:—

*Held*, that the two wills and a codicil to the English will should all be proved in England; but that the document to be retained in the English Probate Registry as evidence of the testamentary act of making the American will should be an examined and sealed copy of that will, and after probate the original American will should be handed out to the executors named therein for probate in America.

Sir Joseph White Todd, the testator in this matter, died on February 19, 1926, leaving property in Great Britain, the United States of America and Cuba.

He made a will, dated June 15, 1925, whereby, after stating that he was domiciled in England and appointing English executors, he dealt with the whole of his property, bequeathed certain legacies, including a legacy to his wife of all his investments in the United States, and he declared that all duties, including estate duty, should be paid out of his residuary estate, and left his residue to be divided between seven different persons. By a codicil to his English will he left his wife a legacy of 30,000*l*. On January 13, 1926, he duly executed in New York an American will, limited expressly to his American and Cuban property, and superseding with regard to it any previous disposition. By this latter will he gave all his American and Cuban property to his wife, directed that this will should be "probated" in New York

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and Cuba, and appointed his wife sole executrix thereof. Accompanying this American will was a memorandum of even date expressing the desire of the testator that it should be " probated " in America.

The English executors lodged all these testamentary documents in the Principal Probate Registry in England.

The widow of the deceased gave notice of a motion to exclude the American will from probate in England, and asking that the American will should be handed out to her on her leaving a duly authenticated copy, in order that it might be " probated " in America.

By a cross-motion the executors asked for probate of all three documents.

The English assets were approximately of the value of 155,000*l.*, and the foreign assets, including those in America and Cuba, a little under 140,000*l.*

Evidence was produced from American lawyers that the widow, being American by birth, had not lost her American citizenship by her marriage with a British subject; that the wills being independent of each other as to property dealt with, the American Court would not admit both to probate; that the English executors, as non-resident aliens, could not take probate or act as administrators with the will annexed in America; and that difficulties would arise in connection with proof of execution in the event of merely common form probate of the English papers being taken here, and also with regard to the assets.

*W. N. Birkett K.C.* and *H. D. Grazebrook* for the widow. The American will should be excluded from probate. *In the Goods of M. E. Schenley* (1) is a parallel case. The practice is settled by *In the Goods of Astor* (2); *In the Goods of Callaway* (3); *In the Goods of Thomas Dickins* (4); *In the Goods of Fraser* (5); *In the Goods of Murray* (6); *Sheldon* v. *Sheldon.* (7)

(1) (1903) 20 Times L. R. 127.
(2) (1876) 1 P. D. 150.
(3) (1890) 15 P. D. 147.
(4) (1842) 3 Curt. 60, 61.
(5) [1891] P. 285.
(6) [1896] P. 65.
(7) (1844) 1 Rob. Ecc. 81.

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Difficulties would arise in the event of all three papers being proved in England.

*Bayford K.C.* and *T. Bucknill* for the English executors. In all the cases cited the wills were independent. In this case the American will affects the incidence of death duties in England and so makes the wills interdependent.

THE PRESIDENT (LORD MERRIVALE). This no doubt is a matter of some importance between the parties from the technical and somewhat difficult questions which have been discussed by learned counsel.

The fact is that the testator here, Sir Joseph White Todd, being possessed of large properties in the United States and in Cuba, and of large properties in this country, in his later years made a will in accordance with the provisions of the Wills Act, he being domiciled here, whereby he disposed of everything that he possessed. He disposed of it in a way perfectly consistent with all his subsequent dispositions, in a manner consistent with the duties of a man whose domestic position was that which his was. There was a codicil to the English will, and later being in New York, and no doubt being advised with regard to the laws of the United States and of Cuba in relation to successions after death, the testator made a will, independent in some particulars, which disposed of his assets in the United States and in Cuba. He did not purport to annul some provisions of the earlier will —which I have called the principal will—which affected those properties. One of those provisions was the disposition of property to provide for estate duties and legacy duties, and whatever duties might affect the substantial bequests which he made to members of his family other than the lady who is now his widow. That disposition appearing in the earlier will is not revoked by the later will. That will is effectual on the face of it, and these facts, when attention is paid to them, show that the set of testamentary dispositions, which are here in question, are not independent but interdependent.

Now the question between the parties is whether the three testamentary dispositions which are here in question may be

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or must be presented for probate here by the executors of what I will call the principal disposition or whether under the authorities, which are well known, it is sufficient that the executors of the principal disposition shall proceed to probate here of the English will and the English codicil and merely place upon record in the Registry evidence sufficient to establish the existence of what has been called the American will. It is said on the part of the widow, who is the beneficiary under the American will, that the proper course is that the documents having direct relation to the English property, the property within the jurisdiction of this Court or in this country, and in Scotland, of which the first applicants here are the executors, should be admitted to probate, and that what is called the American will shall not be admitted to probate. It is said, on the other hand, that these papers being interdependent and the beneficiaries under the original will and codicil having interests in the American property, the whole must be admitted to probate. It is partly a question of principle and partly a question of what is convenient to be done. It did not need the affidavit which has been filed, and properly filed, from a gentleman, who is familiar with the United States law, to inform the Court that difficulties do arise where there are testamentary dispositions of property in this country and property in some of the United States by reason of the different requirements of proof of testamentary acts which exist in this country and in the United States. Proof in solemn form in this country generally establishes the document which is admitted in solemn form to probate in every jurisdiction, but in non-contentious cases in what has been called common form, which is of course well known outside this jurisdiction, the mode of proof is by affidavit, and there is not the evidence which is required for proof in some of the States of the United States. That state of facts makes a practical difficulty in the case, and it makes a practical difficulty quite apart from any question of the operation of these respective instruments. It makes a practical difficulty in the discharge by the widow of the direction given her by her late husband

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that she shall proceed to prove the American will in the American jurisdiction.

Now what I have to consider is how this matter must be dealt with in the first instance, and how it may be dealt with. It is a class of topic which, as has appeared in the course of the discussion, has very often created difficulty. So long ago as 1844 it became necessary that there should be a consideration in the Prerogative Court of questions such as arise here: Dr. Lushington was at that time sitting for Sir Herbert Jenner Fust as judge of the Prerogative Court in the case of *Sheldon* v. *Sheldon* (1), and a question resembling in principle this question and raising the same kind of point as arises here, had to be considered. Dr. Lushington explained what the principles were which applied to the matter. He referred to the practice of the Ecclesiastical Courts, and said: "The general rule used to be, that all papers entitled to probate must be admitted into the probate, and, as papers referred to were legally entitled to probate, the practice was to prove them. The difficulties arose in carrying this rule into practice in all such cases. . . . . Frequently the document referred to was not in the custody of the parties, or the expense of engrossing it was an important matter." A little later, referring to the changes which the Statute of Wills had produced, Dr. Lushington points out that the kind of disposition which of necessity must be proved may vary, but he said this: "Where there is a totally independent instrument no one would be compelled to take probate, but that might be the case with regard to papers incorporated by reference. The title to probate depends upon the clearness and sufficiency of the words of incorporation, the necessity of taking probate will depend upon the validity or invalidity of the instrument to be incorporated." Then Dr. Lushington referred to the case of a valid deed, which was not on the face of it testamentary, but which had testamentary effect, because the testator had directed that his property should be settled on similar trusts to those of the deed. He then said (2): 'There is a title to probate," and he went on to say that if

(1) 1 Rob. Ecc. 81, 86, 88.

(2) 1 Rob. Ecc. 89.

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litigation arose there would be a necessity of probate. Then he added: "I have yet to learn how a Court of law could give effect to such will, unless the instrument referred to formed part of the probate." That was at a time when the jurisdiction in probate was the old jurisdiction of the Ecclesiastical Courts and the Court of Probate was not a branch of the High Court of Justice. Since that time it has been made abundantly clear that if testamentary instruments are independent instruments, the one of them dealing with property outside the jurisdiction and the other dealing with property in the jurisdiction, there is no obligation upon the party who propounds the will relating to property within the jurisdiction to proceed to obtain probate of the will which relates exclusively to property without the jurisdiction. They are independent documents and independent acts. Sir James Hannen dealt with that matter in the case to which reference has been made, *In the Goods of Astor* (1), and the principle upon which Sir James Hannen acted has frequently been reaffirmed in subsequent times. The difficulty has been in determining between one document and the other how the rule applied.

In this case it seems to me that the executors of what I call the principal will, the executors of the first will, are entitled and that it is their duty to take probate of the three inter-dependent instruments which are in question, and I propose to decree that they shall take probate of those three instruments. But I have then to consider whether the Court is so fettered by its rules of practice that by decreeing probate here of an instrument which has some operation in a set of testamentary dispositions of a subject of His Majesty possessed of property within the jurisdiction, it is unable to leave the party who has larger interests in the United States free to obtain probate there without any difficulty from the fact that probate has been granted here. That is a question as to what is to be directed with regard to the instrument which has been called the American will.

If the widow is left free to proceed in the United States

(1) 1 P. D. 150.

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and in Cuba to obtain probate in their respective tribunals of that document, it seems to me that proper regard will have been had to everybody's interests, and I am satisfied that there is power so to order. There is a case in the Ecclesiastical jurisdiction, the Prerogative Court, *In the Goods of Thomas Dickins* (1), where the Court found that the documents were so interdependent that they ought to be proved together, and Sir Herbert Jenner Fust went on to say: "The Court is prayed to decree probate without the original settlement"—that was the incorporated document or the document which had come to have testamentary operation—"on the ground that it is necessary to be retained in the possession of the trustee, to enable him properly to execute his trust; I think in this case, that if a notarial copy be left in the Registry, and a notarial copy form part of the probate, it will be sufficient." I cannot suppose that the power of the Court to do what ought to be done for the purposes of justice is less vigorous than it was in 1842.

What I propose to do is to direct that the three instruments in question be admitted to probate, but that the document to be retained in the Registry, which shall be evidence of the testamentary act in question—namely, what is called the American will—shall be an examined and sealed copy of that instrument, and that the documents being so admitted to probate, when probate with due despatch has been taken in that form, the American will itself shall be handed out to the widow, who is directed by it to proceed under it in the United States, and who I cannot doubt, from the course of the proceedings, desires and intends so to proceed.

Solicitors for the widow: *Slaughter & May.*
Solicitors for the English executors: *Norton, Rose & Co.*

(1) 3 Curt. 61.

J. R. B.

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*May 7.*

ADMIRALTY.

## THE MASSILIA.

*Shipping—Practice—Costs—Witnesses—Expenses of Substitutes—R. S. C., Order* LXV., *r.* 27, *sub-rr.* 9, 29.

The expenses of a substitute to join a vessel from which a witness is necessarily taken are not allowable on taxation as a matter of course.

*Quaere*, whether under Order LXV., r. 27, the expenses of such substitutes are under any circumstances allowable as part of the costs of and incident to the proceedings.

SUMMONS (adjourned into Court for judgment) on objection to taxation of costs.

The defendants, the owners of the steamship *Massilia*, objected to the sum of 89*l.* allowed in respect of the expense of bringing back the master of the plaintiffs' vessel, the steamship *Mirror*, from the Red Sea to give evidence at the trial, and to the sum of 165*l.* allowed in respect of sending out a substitute to the *Mirror* to take charge of her during the master's absence. The facts and arguments are fully stated in the judgment.

*Dumas* for the plaintiffs.
*Balloch* for the defendants.

*Cur. adv. vult.*

May 7. THE PRESIDENT (LORD MERRIVALE) read the following judgment: This is the defendants' application to review the taxation by the assistant registrar of the plaintiffs' costs of the cause.

The plaintiffs, the Eastern Telegraph Co., Ld., were awarded at the hearing 6000*l.* in respect of salvage services rendered in the Red Sea by their cable steamship, the *Mirror*, to the defendants' steamship, the *Massilia*, and the costs of the action. The *Mirror* was stationed in the Red Sea. For the purposes of the trial, to assist in instructing their solicitors and to give evidence, the plaintiffs brought home the master of the *Mirror*, Captain Gibson, and they replaced him by

sending out from England to the Red Sea, the master of another of their vessels, Captain Smythe. They were allowed upon the taxation 89*l.* for their expenses in respect of Captain Gibson and about 165*l.* for their expenses in respect of Captain Smythe. The defendants object to both allowances. They say as to Captain Gibson that to bring a witness from the Red Sea in this case was extravagant and unreasonable, that the plaintiffs brought him here precipitately before a defence had been delivered, and without proposing to the defendants that the case should be tried upon the reports made of the occurrence in question by the plaintiffs' officers. It was not so tried. Alternatively they object that Captain Gibson was brought from the Red Sea unreasonably soon and kept unreasonably long, and that, if he had been brought merely to the hearing and sent back expeditiously, reduced expense would have been incurred, and that no substitute need have been appointed to take his place in the *Mirror*.

The costs as taxed include Captain Gibson's salary and allowances for twenty-seven days in lieu of thirty-nine days claimed. Approximately ten days is the period estimated as necessary for his journey back to his ship. It would appear that if the attendance of the witness at the trial was reasonably necessary his absence from his ship must anyhow have extended over the major part of the time actually allowed.

The rules which govern both the matters in question are contained in Order LXV., r. 27, of the Rules of the Supreme Court, and in particular sub-rr. 9 and 29 of r. 27. Rule 27, sub-r. 9, prescribes that "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed." Rule 27, sub-r. 29, entitles the successful party to "such costs, charges and expenses as shall appear [to the taxing master] to have been necessary or proper for the attainment of justice. . . . ."

The assistant registrar considered that the bringing of Captain Gibson to this country for the purposes of the case

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was not unreasonable, and that the absence of the witness might well have affected the amount of the award. The action was tried before me, and I take a view not less pronounced than that of the assistant registrar in favour of the plaintiffs on this part of the controversy. What is left as to the expenses incurred in respect of Captain Gibson is matter of quantum only. I have scrutinized the items both as to time, occasion, and extent, and no ground appears to me on which I ought, as to these, to interfere with the discretion which has been exercised.

When the taxation of costs was conducted with a less ample discretion than is now vested in the officers of the Court very large allowances for witnesses were made under circumstances like in some respects to those which arose here with regard to Captain Gibson. *Calvert* v. *Scinde Ry. Co.* (1) and *Potter* v. *Rankin* (2) are interesting as instances, though they do not bear directly on the matters here under discussion.

The question of the allowance for Captain Smythe's expenses is more difficult than that as to Captain Gibson. For the defendants it was objected that these expenses are not costs of any proceeding in the cause and therefore are not allowable on taxation. The assistant registrar in his answer to the defendants' objection on these items says that "such expenses are invariably allowed" (i.e., on taxation in the Admiralty Registry) "as matter of course." For the plaintiffs, reference was made also to this statement in the third edition of Roscoe's Admiralty Practice, published in 1903, and at p. 424 in the fourth edition, published in 1920. "The expenses of a substitute to join a vessel from which a witness is necessarily taken can properly be claimed on taxation." The learned Admiralty Registrar, Mr. Roscoe, informs me as follows: "There is not any practice on the point, as the taxing master under Order LXV., r. 27, sub-r. 9, can allow reasonable expenses of procuring evidence, and by Order LXV., r. 27, sub-r. 29, he can allow such expenses as are proper. In every case therefore the question is whether an expense charged is reasonable and proper. These particular expenses

(1) (1865) 18 C. B. (N. S.) 306. (2) (1870) L. R. 5 C. P. 518.

have been regarded as proper, but their allowance does not constitute a practice."

What is allowable on the taxation of costs in a cause within the provisions of Order LXV., r. 27, is "the costs of and incident to the proceedings"; under r. 27, sub-r. 9, "just and reasonable charges and expenses . . . . properly incurred in procuring evidence, and the attendance of witnesses"; and under r. 27, sub-r. 29, "such costs, charges and expenses" as appear to the taxing officer "to have been necessary or proper for the attainment of justice" are allowable because they are "costs of and incident to the proceedings." It is necessary, then, to determine with regard to the outlay incurred by the plaintiffs in respect of Captain Smythe, whom they placed temporarily in command of the *Mirror* during Captain Gibson's absence from her, whether this was expense "incident to the proceedings," "necessary or proper for the attainment of justice," "a reasonable expense properly incurred in procuring evidence," or "procuring the attendance of witnesses"; i.e., are the expenses "necessary, proper or reasonable" in the cause. Captain Smythe's presence on board the *Mirror* was not directly an expense of procuring evidence. He could give none. It was not directly an expense of procuring the attendance of Captain Gibson, whose evidence was reasonably thought necessary. The plaintiffs could command Captain Gibson's presence in London; he was not, and they were not, with regard to him, in the difficult position which sometimes arises where a foreign witness, not bound by any subpœna of an English tribunal, must be bargained with in order to ensure his attendance. What would in fact have happened if the plaintiffs had summoned home Captain Gibson and left the *Mirror* in charge of her first officer for all the necessary time —as they in fact did during part of it—was that in maintaining their claim for an adequate award in respect of the salvage of the *Massilia* in March, 1923, they would have incurred a business risk in operating the *Mirror* in December, 1925. The plaintiffs spent money in sending a substitute to replace Captain Gibson because they thought it a necessary or proper precaution with

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a view to the maintenance of their cable service, a precaution against loss in their business during the absence of a witness. It was an expense which was incurred because their salvage action was contested, but it was incident to the business of the company rather than to the proceedings in the cause. It more nearly approaches damage by litigation than expense of litigation. In my opinion the outlay in question cannot accurately be described in terms which bring it within the ambit of taxable costs, and in this particular the defendants' objection ought to be allowed.

Reference is made in Roscoe's Admiralty Practice, 4th ed., p. 424, to a case cited as *The Elswick Grange* (1) in which Sir Samuel Evans is stated to have held that "the cost of detaining a ship for a trial . . . . is not a personal expense of a witness ; it is . . . . one of the general inconveniences to which under some circumstances parties are put by litigation." I have examined the record and documents in the case thus cited and do not find that the subject here dealt with was directly raised either at the hearing or on review of the taxation of costs. The dictum, however, seems to have some bearing on the matter now in question, and I am not aware of any other judicial opinion with regard thereto.

The conclusion at which I have arrived with regard to the expenses of Captain Smythe in the present dispute has no doubt a necessary relation to a variety of cases in which costs of a substitute for a witness may come in question. I purposely refrain, however, from the expression of any opinion on the general question whether, and in what cases if at all, expenses of such substitutes may be recovered as part of the costs of litigation.

Solicitors for the plaintiffs : *Parker, Garrett & Co.*
Solicitors for the defendants : *Thos. Cooper & Co.*

(1) (1912) Fo. 558 (Unreported).

E. C. M. T.

ADMIRALTY.

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*April* 26;
*May* 4;
*June* 8.

## THE FAGERNES.

*Shipping—Jurisdiction—Collision—Foreign-owned Vessel—Action in personam—British Territorial Waters—Bristol Channel—Service of Notice of Writ out of the Jurisdiction.*

The defendants, an Italian company, moved to set aside an ex parte order for service of notice of a writ in personam upon them in Italy in respect of a collision between their vessel, which sank, and the plaintiffs' vessel in the Bristol Channel some 10½ or 12½ miles from the English coast and 9½ or 7½ miles from the Welsh coast according to the respective cases:—

*Held*, that the waters of the Bristol Channel, at any rate above a line drawn from Bull Point in Devonshire to Port Eynon Head in Glamorganshire, are within the fauces terrae and within the bodies of the above-mentioned counties respectively, and, therefore, within the jurisdiction of the High Court; and accordingly that the order for service of notice of the writ out of the jurisdiction was rightly made.

Motion by the defendants, the Società Nazionale di Navigazione, of Genoa, owners of the steamship *Fagernes*, to set aside an order for service of notice of the writ in the action out of the jurisdiction.

On March 17, 1926, a collision occurred in the Bristol Channel between the steamship *Cornish Coast*, owned by the plaintiffs, and the *Fagernes*. The *Cornish Coast* was damaged and the *Fagernes* was sunk. In those circumstances the plaintiffs brought their action for damage by collision in personam against the owners of the Italian steamship, and obtained an order in chambers giving leave to serve notice of the writ out of the jurisdiction. The defendants thereupon moved to set aside this order on the grounds that the collision occurred outside British territorial waters; that the Court had no jurisdiction to try the case; and, alternatively, that if there was jurisdiction, leave to serve notice of the writ out of the jurisdiction was a matter for the discretion of the Court, which ought not, in the circumstances, to exercise its discretion in favour of the plaintiffs.

*E. A. Digby* for the defendants in support of the motion.
*Balloch* for the plaintiffs.

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[The arguments and authorities cited are fully set out in the judgment.]

*Cur. adv. vult.*

June 8. HILL J. read the following judgment: The question is whether leave to serve notice of writ out of the jurisdiction was properly granted. Leave was granted on an ex parte application of the plaintiffs. The defendants appeared under protest and now ask that the order and notice be set aside. They contend (1.) that leave cannot be granted, and (2.) that if it can, it ought not to be granted.

The defendants are the Società Nazionale di Navigazione, who were the owners of the Italian steamship *Fagernes*. They carry on business in Genoa. On March 17, 1926, the *Fagernes* was in collision with the plaintiffs' steamship *Cornish Coast* in the Bristol Channel. The *Cornish Coast* was damaged and the *Fagernes* was sunk. The plaintiffs' alleged cause of action is negligence causing the collision and damage to the *Cornish Coast*. The claim is therefore in tort. It is a claim within the Admiralty jurisdiction of the High Court. It falls within paras. (*a*) III. and (*a*) IV. of s. 22 of the Supreme Court of Judicature (Consolidation) Act, 1925. It is a claim for damage received by a ship and also a claim for damage done by a ship. By s. 33, sub-s. 2, that jurisdiction may be exercised either by proceedings in rem or by proceedings in personam. The *Fagernes* lies at the bottom of the Bristol Channel, and no proceedings in rem are possible. The plaintiffs' writ is in personam against the defendants as owners of the *Fagernes*. They were undoubtedly entitled to issue that writ. But the writ is of no use to the plaintiffs unless they have leave to serve it out of the jurisdiction, that is, on the defendants in Italy. Under the Rules of the Supreme Court, 1883, until the amendment of Order XI. (1.) in 1920, no question could have arisen. The Court had no power to grant leave for service out of the jurisdiction of notice of writ in an action of tort upon a company domiciled in Italy, unless indeed advantage could be taken of Order XI. (1.) (*g*), as in *The Duc d'Aumale* (1); cf.

(1) [1903] P. 18.

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*Williams* v. *Cartwright*. (1) By the amended rule, Order XI. (1.) (*ee*), leave can be granted when "the action is founded on a tort committed within the jurisdiction." This restored the like power which existed under the Rules of the Supreme Court, 1875, where the words were "any act or thing for which damages are sought to be recovered was done within the jurisdiction": see *Bree* v. *Marescaux*. (2) The first question, therefore, is whether the tort in this case, that is the negligence causing the collision and damage, was "committed within the jurisdiction."

The place of collision is not absolutely agreed, but the difference is immaterial. The defendants place it two miles southerly of the plaintiffs' position. That position is more than twenty miles to the eastward of Lundy Island and some miles to the eastward of a line drawn from Bull Point in Devonshire to Port Eynon Head in Gower, which is part of Glamorganshire. The nearest point on the English coast was a little east of Ilfracombe; the nearest point on the Welsh coast was Oxwich Head. The distance across is about twenty miles. The English coast was distant $10\frac{1}{2}$ miles or $12\frac{1}{2}$ miles, the Welsh coast $9\frac{1}{2}$ or $7\frac{1}{2}$ miles. When I speak of miles, I speak of sea miles. If that spot is "within the jurisdiction," it is immaterial whether it is in England or in Wales. It is equally within the jurisdiction of the High Court. I am not faced with a further difficulty which might arise as to the respective limits of two jurisdictions if the collision were, for example, in the Solway Firth.

The words "within the jurisdiction" mean "within the territorial jurisdiction of the King": see per Sir Robert Phillimore in *In re Smith* (3) and *Harris* v. *Owners of Franconia*. (4) The Bristol Channel is at the place in question and throughout its length bounded by land which forms part of the King's territory. I have not here to deal with the limits seawards of the King's territory, where the coast is bounded by an external sea. That was the question upon which there was so great a divergence of judicial

(1) [1895] 1 Q. B. 142.
(2) (1881) 7 Q. B. D. 434.
(3) (1876) 1 P. D. 300.
(4) (1877) 2 C. P. D. 173, 177.

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opinion in *Reg.* v. *Keyn.* (1) The decision is thus summarized by Lord Coleridge C.J. in the succeeding case of *Harris* v. *Owners of Franconia* (2): "Except where . . . . Parliament has thought fit to extend it, the territory of England and the sovereignty of the Queen stops at low-water mark." Whether that statement is to-day law to the full extent may well be doubted. It has at any rate been decided by the Judicial Committee of the Privy Council that the bed of the sea, at least within the three-mile limit, is the property of the Crown: see *Secretary of State for India* v. *Chelikani Rama Rao* (3), citing with approval *Lord Fitzhardinge* v. *Purcell* (4), per Parker J.; *Lord Advocate* v. *Clyde Navigation Trustees* (5); and *Lord Advocate* v. *Wemyss* (6), per Lord Watson. I am indebted for the reference to the Indian case to an article by Sir Cecil Hurst, "Whose is the Bed of the Sea?" in the British Year Book of International Law, 1923-4, p. 34. In that case Lord Shaw said: "It should not be forgotten that the *Franconia* case (2) had reference on its merits solely to the point as to the limits of Admiralty jurisdiction" . . . . "the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore." But whatever be the true view as to the limits of the King's territory where the coasts are bounded by the external seas, no one has ever doubted that, within limits, inlets of the seas into the land are part of the territory of the State which owns the land on both sides. Cockburn C.J. who gave the leading judgment of the majority in *Reg.* v. *Keyn* (7), was careful to draw the distinction: "If an offence was committed in a bay, gulf, or estuary, inter fauces terrae, the common law could deal with it, because the parts of the sea so circumstanced were held to be within the body of

(1) (1876) 2 Ex. D. 63.
(2) (1877) 2 C. P. D. 173, 177.
(3) (1916) I. L. R. 39 Mad. 617, 626; 43 Ind. App. 192.
(4) [1908] 2 Ch. 139, 166.
(5) (1891) 19 R. 174.
(6) [1900] A. C. 48.
(7) 2 Ex. D. 63, 162, 195.

the adjacent county or counties; but, along the coast, on the external sea, the jurisdiction of the common law extended no further than to low-water mark"; and again, "For centuries before it [i.e., the three-mile limit] was thought of, the great landmarks of our judicial system had been set fast—the jurisdiction of the common law over the land and the inland waters contained within it, forming together the realm of England, that of the admiral over English vessels on the seas, the common property or highway of mankind."

What are the inland waters contained within the land? What are bays, gulfs, or estuaries "inter fauces terrae"? What is the metaphor, the open mouth of a man or of a crocodile? There is very little authority relevant to such a sea as the Bristol Channel, where it is twenty miles wide, or to other bays and inlets with a wide bell mouth. One set of cases relates to bays with a narrow opening, like Plymouth Sound, where no doubt can be entertained. Such cases are illustrated by the passage in the judgment in *Rex* v. 49 *Casks of Brandy* (1), relating to Spithead and the Solent Sea, and *Bruce's Case* (2) (Milford Haven). In another set of cases, the decision was based either upon a statutory recognition of a particular bay as within the territory or an international recognition of the fact. Both grounds were relied on by the Judicial Committee in *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (3), where the question was as to the territorial dominion over Conception Bay in Newfoundland. In *Mortensen* v. *Peters* (4) (see Oppenheim's International Law, vol. i., p. 345), which related to the Moray Firth, there was a statutory Order. In *Mowat* v. *McFee* (5), which related to the Bay of Chaleurs, there was a statute. I believe we are left, as counsel told me, with the passage from Lord Hale, and *Cunningham's Case* (6), and the discussion, but not decision, in the *Conception Bay* case. (3) The passage in Lord Hale, it must be remembered, is concerned with the boundaries of counties. He shared with Selden, Sir Leoline

(1) (1836) 3 Hagg. Adm. 257, 275.
(2) (1812) Leach's C. C. 1093.
(3) (1877) 2 App. Cas. 394, 416, 420.
(4) (1906) 14 Sc. L. T. 227.
(5) (1880) 5 Can. S. C. R. 66.
(6) (1859) Bell's C. C. 72.

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Jenkins in this Court, and others of the seventeenth century and of earlier times, a view as to the King's dominion over the seas, which has long since been abandoned or at most contracted to the limit of three miles. To one who held that the whole of St. George's Channel was in the King's dominions, it would never have occurred to doubt that the same was true of the whole of the Bristol Channel. In the *Conception Bay* case (1) Lord Blackburn points out that: "The question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the Court of Admiralty begins . . . . is not precisely the same question as that under consideration"—the territorial dominion over Conception Bay. In *Reg.* v. *Keyn* (2) Cockburn C.J. says: "The law of England knows but of one territory—that which is within the body of a county." I should have supposed that the Bristol Channel either was or was not part of the King's territory before the time when the Welsh counties were created. At any rate it seems to me that the question of jurisdiction must depend upon whether the place in question is within the territory of England (including therein Wales). If it is, it may follow that it is in a county. No doubt, if it is in a county, it is within the territory. Lord Hale says in his treatise, De Jure Maris et Brachiorum ejusdem (3): "That arm or branch of the sea which lies within the fauces terrae, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner." Lord Blackburn in the *Conception Bay* case (4) cites Lord Coke and Lord Hale and the passage from Fitzherbert cited by them and says: "Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning." I would add: Do they mean see from the beach or from a cliff, and what degree of visibility is assumed in the atmosphere? There can be no doubt that on a clear day you can see Worms

(1) (1877) 2 App. Cas. 394, 416, 420,
(2) 2 Ex. D. 63, 198.
(3) Hargrave's Law Tracts, 1787, I., cap. IV., p. 10.
(4) 2 App. Cas. 394, 417.

Head from Bull Point and from Ilfracombe. There remain *Cunningham's Case* (1) and the discussion in the *Conception Bay* case. (2)

In *Cunningham's Case* (1) the question was whether a crime committed on board an American ship in Penarth Roads was committed within the county of Glamorgan, and it was held that it was; and it was said that "the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded." The facts are summarized by Lord Blackburn in the *Conception Bay* case. (3) I will quote them when I have stated the comparative distances in that case and in the present one. Conception Bay is described as follows: It is in depth forty miles from one headland and fifty miles from the other; the average width is fifteen miles; the width between the two headlands is rather more than twenty miles. The width of the Bristol Channel at various points is as follows. I give the distances in sea miles, and they are approximately correct. Lavernock Point to Brean Down about $7\frac{1}{2}$ miles (this is below the place in question in *Cunningham's Case* (4), where the width is greater). Nash Point to Hurlstone Point about 10 miles; Nash Point and the western limit of Somerset about 12 miles. Passing into Devon but still keeping in Glamorgan, Nash Point and the Foreland about $12\frac{1}{2}$ miles; Porthcawl and the Foreland about 14 miles; Mumbles and Highwear Point about 20 miles; Oxwich Head and Ilfracombe about 20 miles; Bull Point to Port Eynon Head just over 20 miles; Bull Point to Worms Head about 23 miles; Hartland Point to Worms Head about 33 miles; Hartland Point to St. Govens Head in Pembrokeshire about $37\frac{1}{2}$ miles. I may add that 90 miles from Penarth Roads, a distance referred to in *Cunningham's Case* (4), cuts a line drawn from the extreme west of Pembrokeshire to a point well down the coast of Cornwall, and not, as Lord Blackburn seems to say, a line from the west of Pembrokeshire to Hartland Point.

(1) Bell's C. C. 72, 86.
(2) 2 App. Cas. 394, 417.
(3) 2 App. Cas. 394, 417, 418.
(4) Bell's C. C. 72.

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Lord Blackburn, delivering the judgment of the Judicial Committee in the *Conception Bay* case (1), says this: "The Bristol Channel, it is to be remembered, is an arm of the sea dividing England from Wales. Into the upper end of this arm of the sea the River Severn flows. Then the arm of the sea lies between Somersetshire and Glamorganshire, and afterwards between Devonshire and the counties of Glamorgan, Carmarthen, and Pembroke. It widens as it descends, and between Port Eynon Head, the lowest point of Glamorganshire, and the opposite shore of Devon it is wider than Conception Bay; between Hartland Point, in Devonshire, and Pembrokeshire it is much wider. The case reserved was carefully prepared. It describes the spot where the crime was committed as being in the Bristol Channel, between the Glamorganshire and Somersetshire coasts, and about ten miles or more from that of Somerset. It negatived the spot being in the River Severn, the mouth of which, it is stated, was proved to be at King's Road, higher up the Channel, and was to be taken as the finding of the jury. It also showed that the spot in question was outside Penarth Head, and could not therefore be treated as within the smaller bay formed by Penarth Head and Lavernock Point. And it set out what evidence was given to prove that the spot had been treated as part of the county of Glamorgan, and the question was stated to be whether the prisoners were properly convicted of an offence within the county of Glamorgan. The case was much considered, being twice argued, and Cockburn C.J. delivered judgment, saying: 'The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed, forms part of the body of the county of Glamorgan, and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side and the county of Glamorgan on the other. We are of opinion that looking at the local situation of this sea it must be taken to belong to the counties respectively by the shores

(1) 2 App. Cas. 394, 417.

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of which it is bounded; and the fact of the Holms between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff, and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded. We are therefore of opinion that the place in question is within the body of the county of Glamorgan.' The case reserved in *Cunningham's Case* (1) incidentally states that it was about ninety miles from Penarth Roads (where the crime was committed) to the mouth of the Channel, which points to the headlands in Pembroke and Hartland Point in Devonshire, as being the fauces of that arm of the sea. It was not, however, necessary for the decision of *Cunningham's Case* (1) to determine what was the entrance of the Bristol Channel, further than that it was below the place where the crime was committed, and though the language used in the judgment is such as to shew that the impression of the Court was that at least the whole of that part of the Channel between the counties of Somerset and Glamorgan was within those counties perhaps that was not determined. But this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words within the territory of Great Britain. It also shews that usage and the manner in which that portion of the sea had been treated as being part of the county was material, and this was clearly Lord Hale's opinion, as he says not that a bay is part of the county, but only that it may be." Lord Blackburn continues: "Passing from the common law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays land-locked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the

(1) Bell's C. C. 72.

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rule to determine what is 'bay' for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg.* v. *Cunningham* (1) was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable. It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination."

As were the opinions of jurists and text writers in 1877, so are they now. There is no agreement. There is perhaps a tendency in recent years to regard ten miles as the maximum width at which internal waters should begin. But this is mainly based on a number of conventions chiefly relating to fishing, wherein by international agreement ten miles has been taken as the limit. Hall, in the 8th edition of his International Law, p. 196, says: "In the North Atlantic Coast Fisheries Arbitration, 1910, the Hague Tribunal rejected the argument of the United States of America that the alleged three-mile limit was, as a rule of international law,

(1) Bell's C. C. 72.

applicable to bays, and that a bay ceased to be territorial if it exceeded six miles inter fauces terrae. . . . . But having regard to the fact that Great Britain had adopted in several treaties the rule that only bays ten miles in width should be considered as those reserved for fishing by nationals, the tribunal, while recognising that these circumstances were insufficient to constitute this a principle of international law, recommended for the acceptance of the disputants the rule that in every bay which was the subject matter of the case, and for which the award made no specific provision, the limits of exclusion should be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles." The award from which this is taken is printed in the American Journal of International Law for 1910, at p. 977 et seq. The award made specific provision for a number of bays " where the configuration of the coast and the local climatic conditions are such that foreign fishermen when within the geographic headlands might reasonably and *bona fide* believe themselves on the high seas." These bays so specifically defined include Chaleurs Bay and Miramichi Bay, where the line drawn is much more than ten miles long.

Sir Cecil Hurst in an article on the Territoriality of Bays in the British Year Book of International Law thus states the rule of international law to be deduced from the North Sea Fisheries Convention, 1882 : " The belt of territorial waters is measured from a line which in general is the line of low-water mark. When this line reaches a port, it will pass across from point to point of the outermost works forming the port. When the line reaches a bay it will pass across from shore to shore. A bay for this purpose means a defined inlet, penetrating into the land, moderate in size and with both shores subject to the same sovereign. An inlet at the mouth of which one can see clearly from shore to shore may be presumed to have been appropriated as part of the national territory and will, therefore, constitute a bay ; for working purposes this distance may be taken as ten miles and the line will then pass from headland to headland. In the case

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of a larger inlet it lies on the territorial state to establish that it has been appropriated as part of the national territory. Where this is not proved, the line from which the territorial waters are measured will not pass from headland to headland, but will cross the inlet at the spot where it first narrows to such an extent as to be obviously a bay; in practice this may be taken as the place where it first narrows to ten miles. All the waters lying inwards from this base line are national waters and form part of the national territory. They stand in all respects on precisely the same footing as the national territory. Waters within the three-mile limit to seawards of this base line are territorial waters." (1) There is, however, apart from conventions, no authority for fixing the limit at ten miles. The Institute of International Law has recommended a limit not of ten miles but of twelve miles, " unless established usage has sanctioned a greater breadth ": Oppenheim's International Law, 3rd ed., vol. i., p. 343. The result is that international law and lawyers are no more agreed now than they were in 1877, when Lord Blackburn spoke.

I return to the common law with a regret that the Judicial Committee was not obliged to decide the point in the *Conception Bay* case. (2) My guide is *Cunningham's Case*. (3) What did the Court mean by " the whole of this inland sea between the counties of Somerset and Glamorgan." The place in question was, it is true, above Lavernock Point, but the words used do not limit the inland sea to parts above Lavernock Point. And if the waters above Lavernock Point are within the fauces terrae, I see no reason why the same is not true of the waters above a line drawn from Nash Point to the Foreland or the waters above a line drawn from Bull Point to Port Eynon Head. For the purposes of this case I need go no further.

I have had to decide this case on common law alone. The only statute suggested as affecting the Bristol Channel was a pilotage Act. But a provision that a ship entering a port

(1) British Year Book of International Law, 1922–23, p. 54.

(2) 2 App. Cas. 394.

(3) Bell's C. C. 72.

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must take a pilot at such and such a place does not, in my view, throw any light on the question whether that place is within the territory of the state which owns the port. The result is that I hold that the tort was committed within the jurisdiction, and the Court has power to order service of notice of the writ out of the jurisdiction.

The second question is whether the Court ought to give leave. No doubt the discretion must be exercised with care and so as not to be oppressive to the foreigner: see *The Hagen*. (1) There is probably no greater inconvenience, so far as witnesses go, in trying the case here than in Italy. If the *Fagernes* had remained afloat and put into a port of refuge here, a writ in rem would have compelled a trial here. No doubt it is of the very greatest importance to the defendants that the plaintiffs should be left to an action in Italy. If the *Fagernes* was to blame it will make all the difference between a liability limited by English law to 8*l*. per ton and a liability limited by Italian law to the ship, which lies in some eighteen fathoms of water. But I should be pushing a tender regard for the defendants to an extreme limit if on that account I refused to allow the plaintiffs to bring them before this Court. I must exercise my discretion in the plaintiffs' favour. I therefore dismiss the motion to set aside the order in this case with costs.

Solicitors for plaintiffs: *Godfrey Warr & Co., for Batesons & Co., Liverpool.*

Solicitors for defendants: *Stokes & Stokes.*

(1) [1908] P. 189.

E. C. M. T.

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*June* 14, 21.

DIVORCE.

## WEBSTER *v.* WEBSTER AND WILLIAMSON.

*Divorce—Variation of Settlement—Innocent Spouse—Fresh Power of Appointment on second Marriage—Interest of existing Children.*

In any question of variation of settlement the Court regards the interests of children of the marriage as the first consideration. And though it has the fullest power to vary the settlement, it will not give the innocent spouse a power to appoint to children of a second marriage to the detriment of existing children of the first, unless the original settlement contained such a power. But if there is such a power in the original settlement, the Court may accelerate its exercise.

In this case the parties were married in 1917. A decree for divorce on the petition of the husband was made absolute on January 11, 1926, by reason of the adultery of the wife. There were two children of the marriage then living, born in 1918 and 1922 respectively. By a settlement executed before the marriage, property brought into settlement by the husband was settled on him for life, remainder to the wife for life, and an ultimate remainder to the children of the intended marriage as the husband and wife jointly, or the survivor, should appoint. The husband was given a power to draw out of the settlement a sum of 2000*l.*, but there was no provision for any settlement by him in the event of a second marriage. The wife brought no property into settlement. The husband filed a petition, dated February 8, 1926, to vary the settlement by asking that all rights, powers and interests of the wife under it should be extinguished, and, further, that after the word "intended" the words "or any subsequent marriage by the husband" should be substituted for "marriage." On May 4, 1926, the husband by notice asked that he might be given power to resettle three-fourths of the trust fund upon a future wife. The registrar reported that the settlement should be varied only by extinguishing the rights, powers and interests of the wife. On June 7, 1926, the husband gave notice to vary the report by inserting in the settlement powers for the petitioner, (1.) to settle a

life interest in three-fourths of the settled funds upon a future wife; and (2.) to appoint to children of a future marriage.

*W. O. Willis K.C.* and *Acton Pile* for the petitioner. The Court has unlimited power over the property settled: *Dormer* v. *Ward*. (1) No doubt what we ask for may affect the interests of the existing children. But in *Blood* v. *Blood* (2) Lord Gorell (then Gorell Barnes J.), referring to *Whitton* v. *Whitton* (3), decided that the Court had power to affect them. *Hodgson Roberts* v. *Hodgson Roberts* (4) shows that the Court may order the powers of the new settlement to be exercisable during the lifetime of the respondent. *Atkins* v. *Atkins* (5) is a direct authority for the application.

[HILL J. How does the proposed variation benefit the children of the marriage in compliance with the statute, Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5), c. 49, s. 192 ?]

It benefits the husband, the innocent party; he will be assisted by it to marry again.

*A. de W. Mulligan* for the children of the marriage. The application is for the benefit of strangers—namely, a second wife and her children. Benefit in the statute means beneficial interest. It is not a benefit to the husband that he should be able to give a gift: *Sykes* v. *Sykes*. (6) There is no quid pro quo, as it has been termed, for the children of this marriage. They give a benefit and get no acceleration of what remains. *Atkins* v. *Atkins* (5) is no authority; the case was not argued and the infant's counsel consented. *Crisp* v. *Crisp* (7) and *Forsyth* v. *Forsyth* (8) are authorities against the application. There is no present power to withdraw property from the existing settlement, as there was in *Whitton* v. *Whitton* (3), *Hodgson Roberts* v. *Hodgson Roberts* (4), and *Hartopp* v. *Hartopp*. (9) The Court is asked to create a new power of

(1) [1900] P. 130.
(2) [1902] P. 78.
(3) [1901] P. 348.
(4) [1906] P. 142.
(5) [1913] P. 211.
(6) (1870) L. R. 2 P. & M. 163.
(7) (1872) L. R. 2 P. & M. 426.
(8) [1891] P. 363.
(9) [1899] P. 65.

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appointment. *Maudslay* v. *Maudslay* (1) shows the reluctance of the Court to interfere with powers.

*Cur. adv. vult.*

June 21. HILL J. In this case the settlement which the Court is asked to vary is one which gives a life interest to the husband and then a life interest to the wife and then in trust for the children of the marriage with power of appointment among them but not otherwise. It does not provide for the contingency of one of the spouses dying and the survivor marrying.

The registrar submits that the settlement be varied only by extinguishing the rights of the respondent as if she were dead. The husband asks that the variation should go beyond that and provide for something not contemplated by the settlement—namely, a possible future marriage of the husband. He wants a limited power of appointment in favour of a future wife and children of a future marriage.

It was contended for the children that the Court (1.) has no power to do it, and (2.) if power exists ought not to do it. No case has been found in which such a variation of settlement was ordered, except *Atkins* v. *Atkins*. (2) In that case there was no argument as to the power of the Court and none of the cases were cited. Counsel for the children supported the proposed variation. I cannot regard such a decision as a binding authority. In my opinion it is contrary to the general sense of the cases in which the question of variation has been argued and made the subject of considered judgments. I am inclined to think that during the last thirty or forty years the judges have been inclined to take a wider view of the power of variation than was taken by Lord Penzance and Sir R. Phillimore. But throughout the decisions the interests of the children of the marriage are regarded as the most important element for consideration. In *Forsyth* v. *Forsyth* (3) Sir F. Jeune put it as high as this—" that the Court has no power to deprive infant children of any interest which they may have under the

(1) (1877) 2 P. D. 256. (2) [1913] P. 211.
(3) [1891] P. 363.

settlement. It follows therefore that the husband's interest must be carved, so to speak, out of the wife's interest—that no interest of his shall survive the wife's, and that the interest of the children shall remain the same as it was before."

In *Whitton* v. *Whitton* (1) there was in the settlement a power to appoint to a second spouse, and so in *Hodgson Roberts* v. *Hodgson Roberts*. (2) In these cases Sir F. Jeune and Sir G. Barnes respectively allowed a variation treating the acceleration of the children's interest as a quid pro quo for permitting the innocent spouse to exercise a power of appointment on second marriage. What was done was merely to give the innocent spouse an acceleration of the power of appointment on a second marriage which he had under the settlement: see also *Hartopp* v. *Hartopp*. (3)

But in the present case, if the wife had died, the husband would have had no power of appointment in favour of a second wife or children by her. The Court is not asked merely to treat the wife as if dead and to accelerate a power which the husband would have in that event. It is asked to create a new power which is not contemplated by the settlement. I do not think the Court ought to do that. I am inclined to say that the Court has no power to do it, but I do not want in any way to limit the generality of the words used by Lord Gorell when he pointed out the importance of the Court maintaining the fullest power to vary settlements. If the Court has power to do it I do not think that the Court ought to do it, and therefore I must confirm the report.

Solicitors for the petitioner and the children: *Webster & Webster.*

Solicitors for the respondent and co-respondent: *Withers, Bensons & Co.*

(1) [1901] P. 348. (2) [1906] P. 142.
(3) [1899] P. 65.

J. R. B.

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*July 5.*

DIVORCE.

## EDMUNDS *v.* EDMUNDS.

*Divorce—Permanent Maintenance—Increased Means of Husband—Power o Court to increase Orders made under Matrimonial Causes Act,* 1866 (29 & 30 *Vict. c.* 32), *s.* 1—*Matrimonial Causes Act,* 1907 (7 *Edw.* 7, *c.* 12)—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 187, 190, 196.

The power to increase the amount provided by an order for permanent maintenance upon an increase in the means of a husband conferred by the Matrimonial Causes Act, 1907, and the Supreme Court of Judicature (Consolidation) Act, 1925, which repeals and re-enacts the power given by the former Act, is retrospective in its operation and extends to dealing with orders made under the previous Act—namely, the Matrimonial Causes Act, 1866.

On August 24, 1904, the wife obtained on petition a decree absolute for divorce, and on April 17, 1905, an order for permanent maintenance at the rate of 125*l.* a year. This order was made under the Matrimonial Causes Act, 1866, s. 1, which gives the Court power to discharge, modify, suspend and revive its orders according to variation in the means of the husband, but not to increase the amount of the order. The section was repealed by the Matrimonial Causes Act, 1907, which for the first time gave the Court power to increase the amount of the order upon an increase in the husband's means. And the whole of the latter Act was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, which came into force on January 1, 1926, s. 190 of which re-enacted the power to increase.

The petitioner filed a petition under the Act of 1907 on July 30, 1925, for an increase of her permanent endowment. On this petition a registrar made an order, dated June 17, 1926, for the payment of 200*l.* a year free of tax. From this order the husband appealed on summons to the judge, who heard the case in chambers, but adjourned it for judgment only into Court.

The appellant in person.

*Noel Middleton* for the respondent.

July 5. HILL J. delivered a written judgment. Following a decree of dissolution of marriage, Barnes J., on April 17, 1905, made an order that the respondent, the husband, should pay to the petitioner, the wife, as from August 24, 1904, and during the joint lives of the petitioner and respondent, the sum of 125*l.* per annum by equal monthly instalments for her maintenance and support. This order was made under s. 1 of the Act of 1866, which was repealed and re-enacted with further provisions by the Act of 1907.

By the order now under appeal, made on June 17, 1926, the registrar has ordered that the order of April 17, 1905, be varied by increasing the sum payable until further order from 125*l.* to 200*l.* per annum (free of tax), to be payable by equal monthly instalments.

If the original order had been made under s. 1. sub-s. 2, of the Act of 1907, there can be no question that the registrar would have power to make the order of June 17, 1926. That power is given by proviso (*b*), s. 1, sub-s. 2. The question is whether the power to increase for the first time conferred by s. 1, sub-s. 2, proviso (*b*), of the Act of 1907 applies to an order made under the Act of 1866.

The words of (*b*) are: "Where the Court has made any such order as is mentioned in this sub-section." The mention is in sub-s. 2—"in any such case the Court may, if it think fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum, etc." The words "in any such case" refer back to sub-s. 1, and mean "on any decree of dissolution or nullity of marriage."

Are the words "any such order" in (*b*) limited to an order made under sub-s. 2? The words of (*b*) are not "made any order under this sub-section" but "made any such order as is mentioned in this sub-section." The order made under s. 1 of the Act of 1866 was such an order as is mentioned in sub-s. 2 of s. 1 of the Act of 1907. In my opinion the words were intended to include an order made under s. 1 of the Act of 1866. Proviso (*a*) repeated s. 1 of the Act of 1866. Proviso (*b*) was new, and was made to apply to any order which had been or should thereafter be made by the Court

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on a decree of dissolution or nullity of marriage for payment during joint lives of a monthly or weekly sum. I therefore think that there was jurisdiction to make the order of June 17, 1926.

I have dealt with the case as if it is governed by the Act of 1907. The conclusion is the same if it is governed by s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, which has replaced s. 1 of the Act of 1907. I need not consider in this judgment whether s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, has a general application to orders for money payments, or refers only to the periodical payments mentioned in s. 187.

On the question of quantum, that is in the discretion of the registrar, and the registrar has not proceeded on any wrong principle. Therefore in my view there is no ground for interfering. It was suggested that the words "free of tax" had been inserted per incuriam in the order, but I have made inquiries and I find that the registrar has considered the matter and the order as drawn up is what he intended to make.

The appeal must be dismissed.

Solicitors for the wife: *Mills & Morley.*

J. R. B.

ADMIRALTY.

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*June* 29, 30;
*July* 1,

## THE STIKLESTAD.

*Shipping—Salvage—S.O.S. Calls for Assistance—Services at Request—No actual Benefit—Principles applicable.*

The mere response to an S.O.S. call for assistance does not of itself necessarily give a right to salvage remuneration on the part of the ship that comes to the help of the vessel in distress; but where the vessel in distress sends out a wireless call and definitely accepts the offer of a particular ship to come to her assistance on a salvage basis, and that ship comes, she is entitled to an award even if her efforts result in little, if any, benefit, provided the disabled vessel is ultimately saved by other means.

CONSOLIDATED ACTIONS OF SALVAGE.

The plaintiffs, the owners, masters and crews of the steam tug *Zwarte Zee*, the steamship *Geraldine Mary*, the steamship *Flint*, and the steamship *Dampfem*, claimed salvage remuneration for services rendered to the Norwegian steamship *Stiklestad*.

On October 3, 1925, the *Stiklestad*, a screw steamship of 6350 tons gross register, while bound from Rotterdam to Newfoundland in ballast, broke her propeller shaft in lat. 50° 11′ N., long. 41° 25′ W. From that time until November 12, when she was towed into the Azores, she drifted in very bad weather some 300 miles E. and W. and 200 miles N. and S., sometimes going one way and sometimes another, but always being more or less blown to the eastward and away from the American coast. She was fitted with wireless, and, with the assistance of other vessels' wireless, was in touch with both sides of the Atlantic.

The underwriters' agents on the American side first of all engaged a tug, the *Reindeer*, to go out from Halifax, but she never reached the *Stiklestad* and eventually returned. On October 17 a wireless message reached the *Dampfem*, a screw steamship of 4100 tons, bound from Rotterdam to Newfoundland in ballast, manned by a crew of thirty-three hands. The master of the *Stiklestad* at first requested towage for a daily

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rate of remuneration, but the master of the *Dampfem* insisted on salvage terms, and finally the master of the *Stiklestad* replied: "Accept your offer for assistance." Thereupon the *Dampfem* deviated from her own course, and reached the *Stiklestad* on the evening of October 19. On October 20 the *Dampfem* succeeded in passing two towing wires to the *Stiklestad*, but they parted in a very short time, and on the morning of October 21, the weather having got worse and it being impossible to re-establish connection, the *Dampfem* resumed her voyage by mutual arrangement. Subsequently the *Stiklestad*, after being assisted by the *Geraldine Mary* and the *Flint*, was towed to the Azores by the *Zwarte Zee* and the *Relief*, an American salvage steamer which was engaged on special terms.

The case is reported only on the claim of the *Dampfem* and on the effect of sending out S.O.S. calls for assistance.

The *Dampfem* alleged that at the request of the master of the *Stiklestad* she proceeded to the *Stiklestad* and stood by her and tried to take her in tow, and only relinquished the attempt when it was obvious that her efforts would not be successful. At the time when the *Dampfem* altered course to proceed to the *Stiklestad*, the *Dampfem* was about 440 miles to the eastward of her destination, and but for her deviation would have arrived at her destination in about two and a half days. In rendering the services she used up about sixty fathoms of ratline and sixty fathoms of manilla rope; consumed extra coal and stores; and sustained damage by straining to her hull and rudder, which were repaired at a cost of 962*l*. She also suffered damage by delay.

The defendants alleged that the service attempted to be rendered by the *Dampfem* was unsuccessful, her efforts were useless and her time was wasted; that she rendered no salvage services and was entitled to no salvage. If, on the contrary, the service was a salvage service it was valueless. The *Stiklestad*, according to the defence, was never in danger. She had merely lost her motive power temporarily and required towage to land, but not a standing-by service. She did not engage the *Dampfem* to stand by her. During

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October 21, the day on which the *Dampfem* abandoned the service, the *Stiklestad* was in wireless touch with three vessels which were near by and proffered assistance which the *Stiklestad* refused. She was, it was alleged, in the direct line of the Bell Island traffic, and ample assistance of the character attempted by the *Dampfem* was always available to her and was continually offered her and refused.

The value of the *Stiklestad* in her damaged condition was agreed at 31,000*l.*

*Dumas* for the *Zwarte Zee.*
*Alfred Bucknill* for the *Dampfem.*
*E. A. Digby* for the *Geraldine Mary.*
*Balloch* for the *Flint.*
*Stenham* for the defendants.

BATESON J. The figures at which I have arrived are 4000*l.* for the *Zwarte Zee ;* 2400*l.* for the *Geraldine Mary*, including 200*l.* for the master and 400*l.* for the crew ; 800*l.* for the *Flint ;* and 400*l.* for the *Dampfem.*

[After setting out the main facts of the case his Lordship said that he thought the position of the *Stiklestad* was a very serious one, even though, in these days of wireless, assistance might be asked for from a number of ships. The Elder Brethren were of opinion that the vessel was in grave danger of the propeller getting adrift and that her life depended on the temporary repairs holding. It was mid-winter, and there was a succession of gales. It was argued on behalf of the defendants that the vessel was quite safe and certain to be picked up, but he did not accept that contention at all. The risk could be measured by the length of time the vessel was out, and by the efforts of those on shore and the heavy sum they were prepared to pay to get the help they did. All the services were rendered with great pluck and perseverance.]

His Lordship then dealt with the four cases in detail, and in respect of the claim of the *Dampfem*, said : The case of the *Dampfem* is an interesting one. She began by getting into communication with the *Stiklestad* on the night of October 17,

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and on October 19 she came up with her in the evening. On October 20 she tried to make fast. She got two 5-inch wires on board and tried to tow, but the ropes parted, and she ended her services by mutual arrangement on October 21 at 10.45 in the morning. She was about $3\frac{1}{2}$ days in communication with the *Stiklestad;* she had to steam something like 120 miles to get to her; and she had to go back on her course to the north and east to do so. She did not actually do any good in towing, because she was only fast for a short time. She got a little damage in the course of her operations. The way in which she came to be engaged was this: Apparently the vessels were in communication by wireless. It began with a message from the captain of the *Stiklestad* to the captain of the *Dampfem* offering 500 dollars a day for towing the *Stiklestad* three or four days "the same way as yourselves." The *Dampfem* would in that case have to renounce her rights to salvage, and the master of the *Dampfem* replied demanding full salvage award. The master of the *Stiklestad* answered, "Cannot accept your offer," and later offered compensation, according to arbitration, for being towed to St. John's or until receiving assistance from shore. The reply of the *Dampfem* insisted upon a salvage award basis as per previous message. Finally the master of the *Stiklestad* wirelessed: "Accept your offer for assistance." As I read the message that means: "Come to my assistance on salvage basis." There was no bargain to tow. There was no bargain, I think, to do more than come to the assistance on a salvage basis. I consider these wireless messages as meaning: "Will you come to my assistance and do what you can, and take a daily rate?" The answer is: "Yes, I will come to your assistance and do what I can, but I will not take a daily rate. It must be salvage terms." Finally the decision closing the matter is the last radiogram from the master of the *Stiklestad:* "Accept your offer for assistance." That is an offer of services to be paid on a salvage basis. That that is the right view is, I think, confirmed by looking at the different documents.

On those facts it seems to me the case is brought more

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within *The Helvetia* (1), decided by Gorell Barnes J., than *The Dart*. (2) In *The Helvetia* (1) two trawlers which tried to assist the ship, but were really unable to do anything, were given an award for their efforts, Gorell Barnes J. saying: "It seems to me that if there is in fact a request to render assistance . . . . a request to attempt to tow the ship, and the service requested is in fact performed so far as it is possible to do it, and the ship afterwards is saved by other means, then the persons who rendered the services are, as indicated in the passage I have just read, entitled to some salvage remuneration."

Here what really took place was that the *Dampfem* was asked to come some 100 or 200 miles to the assistance of the *Stiklestad*, and she did come. She performed part of the service which she was engaged to do, and for that, I think, all the cases show that she was entitled to be paid something. In *The Dart* (2) Phillimore J. says: "If a salvor is employed to do anything and does it, and the property is ultimately saved, he may claim a salvage award, though the thing which he does, in the events which happen, produces no good effect. If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award. If a salvor is employed to do a thing and does not do it, and no doubt uses strenuous exertions and makes sacrifices, but does no good at all, then it seems to me he is not entitled to salvage." I think this case comes within the first of these propositions and not the last, as Mr. Stenham contended, and I am glad to think that if a ship in dire distress, as the *Stiklestad* was, asks another ship to go to her help it is possible to give that other ship some award, even although her efforts result in little, if any, good. Of course there is always the moral support of one vessel to another in these circumstances, and that is an element in a salvage award. At one time I thought the wireless messages were a bargain to tow to St. John's, but I have come to the conclusion that I was wrong. Mr. Bucknill has convinced me that the

(1) (1894) 8 Asp. M. L. C. 264n. (2) (1899) 8 Asp. M. L. C. 481, 483.

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*Dampfem* is entitled to an award, and I have given effect to that in allowing 400*l*. It is a very small sum, considering that it has to be shared with the master and crew, for trying to help a vessel in great distress, involving the expenditure of time and money in doing what the *Dampfem* was asked to do—to come to the help of the *Stiklestad*.

I do not shrink from this result in other cases where a ship is definitely asked to come to another ship's help. This judgment will not mean that when a ship sends out an S.O.S. message every other ship on the sea is thereby entitled to go to that ship and then say: "Now I want to be paid a salvage award." I do not think that follows at all. In this case there was a definite request to this particular ship to come to the help of the *Stiklestad* and she did come to her help, although as events turned out she was not able to do much good.

Solicitors for the *Zwarte Zee*: *William A. Crump & Son.*

Solicitors for the *Geraldine Mary*: *William A. Crump & Son, for Maclay, Murray & Spens, Glasgow.*

Solicitors for the *Flint*: *Lowless & Co.*

Solicitors for the *Dampfem*: *Constant & Constant.*

Solicitors for the defendants: *Thos. Cooper & Co.*

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## THE ALDE.

*Shipping—Collision—Damage—Limitation of Liability—"Improper Navigation"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 503, *sub-s.* 1 (*d*).

By s. 503, sub-s. 1 (*d*), of the Merchant Shipping Act, 1894: "Where any loss or damage is caused to any other vessel . . . . by reason of the improper navigation of the ship," the owners of the ship, if not guilty of any fault or privity, shall not be liable to damages beyond an aggregate amount not exceeding 8*l.* for each ton of their ship's tonnage.

The plaintiffs, the Port of London Authority, owners of the barge *Alde*, sought to limit their liability to an amount based on the tonnage of the barge in respect of the amount of the damage caused by the *Alde* forcing another barge, the *Tom Tit*, on to the propeller of the steamship *Ascania*. At the trial of the damage action the *Alde* was held to blame, but it was left in doubt whether the man in charge of her did not derive some assistance in giving her the forward movement which did the damage from some men working a capstan on the P.L.A.'s grain sucker *Turbo*. Accordingly, in the present action, the owners of the *Ascania* contended that the plaintiffs had failed to establish that the damage was solely caused by the improper navigation of the *Alde*, and that therefore they were not entitled to a decree of limitation of liability at all, or, in the alternative, that they could only limit on the combined tonnage of the *Alde* and the *Turbo*:—

*Held*, that s. 503 gave relief in respect of improper navigation of a ship and not in respect of negligence by individuals; that the improper use of a capstan on a stationary vessel did not constitute improper navigation on the part of that vessel; and that the plaintiffs were entitled to a decree of limitation of liability based on the tonnage of the *Alde* alone.

Action of limitation of liability.

The plaintiffs, the Port of London Authority, as owners of the barge *Alde*, sought to limit their liability to an amount not exceeding 8*l.* per ton on the registered tonnage of the *Alde* ascertained in accordance with the Merchant Shipping Acts, 1894–1921, in respect of damage sustained by the steamship *Ascania*, the barge *Tom Tit*, and the cargo laden on board her under the following circumstances.

On July 28, 1925, the steamship *London Commerce* was lying alongside a berth in the Greenland Dock, River Thames; a grain sucker, the *Turbo*, belonging to the Port of London Authority, was moored alongside her; and a short distance

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away the *Ascania* was lying moored to buoys. In these circumstances, while the *Alde* was waiting to go alongside the *Turbo* to load, the laden barge *Tom Tit*, which had been fast to the *Alde*, had cast off and was going down the passage way between the *London Commerce* and the *Ascania* to get out into the river. Before the *Tom Tit* was clear, however, the *Alde* was let go, and she came against the *Tom Tit*, forcing that barge on to the propeller of the *Ascania*, with the result that the *Tom Tit* was holed and sank together with her cargo, and the propeller of the *Ascania* was damaged. In the action arising out of this accident brought by the owners of the *Ascania* against both the owners of the *Tom Tit* and the owners of the *Alde*, Bateson J. held the *Alde* to blame and the *Tom Tit* free from blame.

In giving judgment on March 23, 1926, the learned judge said that the bargeman on the *Alde* cast off his ropes to get alongside the *Turbo*, and left the *Alde* free to move almost as soon as the *Tom Tit* had begun to move. The Elder Brethren thought that the *Alde* in motion, even by the wind alone, would get quite sufficient way to push the *Tom Tit* side ways and so on to the propeller of the *Ascania*, a fortiori if there was any heaving by hand to assist that motion, or still more if there was any movement by the capstan on the *Turbo*, " and," his Lordship continued, " I am not at all satisfied that both methods were not used to get the *Alde* into position. I am inclined to think, if I had to decide it, I should say there was some heaving. . . . . I am inclined to think that the *Alde* was taking the place which had been standing idle on that side of the *Turbo* a good long time, they would no doubt be anxious to get on with the loading, and without considering the *Tom Tit* they began to heave."

The Port of London Authority, accordingly, brought the present action to limit their liability to the sum of 824*l.*, being 8*l.* per ton on the registered tonnage of the *Alde*. The defendants, the owners of the *Tom Tit* and the owners of her cargo, merely put in the usual formal defences, but the owners of the *Ascania* by their defence alleged that the damage was caused or contributed to by the negligence in the management

of the *Turbo* and by the improper working of the capstan on board her by the servants or agents of the plaintiffs, or by one of those causes. They contended, therefore, that the plaintiffs were not entitled to the relief claimed, and, alternatively, that they were only entitled to limit in a sum based upon the tonnage of the *Alde* and the *Turbo* added together.

*L. Batten K.C.* and *Lewis Noad* for the plaintiffs. All that was charged and proved by the owners of the *Ascania* against the present plaintiffs at the trial of the damage action was that the *Alde* was improperly navigated. It was not found as a fact that the capstan on the *Turbo* was being worked, and in any event the improper use of a rope or a crane on a stationary craft such as the *Turbo* would still be the " improper navigation " of the vessel thereby being moved : see *The Warkworth*. (1) The limitation sections in the Merchant Shipping Act were passed in favour of shipowners, and the plaintiffs bring themselves within the exact terms of s. 503, sub-s. 1 (*d*).

[*The Umona* (2) was also referred to.]

*Dunlop K.C.* and *Balloch* for the defendants, the owners of the *Ascania*. The judgment in the damage action found that there " might have been " heaving on the *Turbo*, and, on the evidence as it stands at present, that disposes of the case ; it is for the plaintiffs to prove that there was no heaving either by hand or by the capstan on the *Turbo* and that the damage was solely caused by the improper navigation of the *Alde*. If they fail to prove that they are not entitled to the relief claimed. If, however, the plaintiffs are entitled to a decree of limitation of liability, the relationship of the *Turbo* to the *Alde* resembles that of tug and tow, and, on the principle underlying the decision in *The Ran ; The Graygarth* (3), even although the only vessel actually held in fault was the *Alde*, the limit of liability should be the combined tonnage of the *Alde* and the *Turbo*—if indeed a

(1) (1884) 9 P. D. 145. (2) [1914] P. 141.
(3) [1922] P. 80.

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grain sucker is a " ship " within the meaning of the limitation section of the Act at all: see also *The Harlow* (1), where the damage was caused by the negligence of a tug and two barges, all belonging to the same owners, and the basis of the limitation of liability was held to be the tonnage of all three vessels. This is an analogous case. " Improper navigation " is not confined to acts on board the vessel herself, the act of negligence may occur elsewhere, as, e.g., on shore: *The Warkworth*. (2)

*Batten K.C.* in reply. The plaintiffs have not got to exhaust every possibility. The *Turbo* was not in fact being " navigated."

*Dumas* for the defendants, the owners of the *Tom Tit*, and *Harold Stranger* for the owners of her cargo, took no part in the arguments.

BATESON J. I think the plaintiffs bring themselves within the words of s. 503, sub-s. 1 (*d*), of the Merchant Shipping Act, 1894. The action is brought to limit the liability of the Port of London Authority to an amount based on the tonnage of their barge *Alde*, which forced the barge *Tom Tit* into collision with the steamship *Ascania* and did damage to both the *Tom Tit* and the *Ascania*, and also to the cargo of the *Tom Tit*. I am quite clear that at the trial of the collision action I thought the accident was caused by the improper navigation of the *Alde*. The *Alde* was navigated by the man in charge of her, but apparently, according to my judgment in the collision action, he may have got some assistance from some other men on a grain sucker, the *Turbo*, to help him navigate the *Alde*. It does not seem to me that that makes it any the less the navigation of the *Alde*. It never occurred to me, I feel sure, during the course of the trial, that the *Turbo* was being navigated or that the *Turbo* navigated the *Alde*, and I do not think that the capstan on the *Turbo*, even if used—and I did not find as a fact that it was being used, although I suggested there might have been some heaving either by hand or by the capstan—was navigating the *Turbo*. I do not think that heaving by a capstan on board a ship,

(1) [1922] P. 175. (2) (1884) 9 P. D. 145.

so as to pull another ship, is navigating the former ship, any more than pulling by a capstan on shore is navigating the shore, as distinct from navigating the ship; or that when a man is pushing a vessel, either by a pole from the shore or from another ship, or when he is heaving by a winch on board another ship, he is doing anything but navigating the ship which he is moving. The navigation is that of the vessel which is being moved, and not of the implement which is stationary, either on a ship or on shore, whether it is made to revolve by steam or used by hand.

The words of the section are: "Where any loss or damage is caused to any other vessel . . . . by reason of the improper navigation of the ship." Mr. Batten contended that the plaintiffs are clearly covered by those plain words, and that in this case the damage was all caused by the improper navigation of the *Alde*, and by no improper navigation of any other ship. Mr. Dunlop, for the owners of the *Ascania*, argued that it is for the plaintiffs to show that the damage was solely caused by the improper navigation of the *Alde*. In my opinion it was clearly caused solely by the navigation of the *Alde*. I think that confusion of thought arises when one discusses the negligence of individuals as distinct from improper navigation. Individual negligence does not seem to me to have anything to do with the section, which allows the relief for improper navigation of the ship. Of course the navigation of a ship must be done by individuals, but it is the navigation of the ship which gives a right to limitation of liability, and not the negligence of individuals. Mr. Dunlop contends that the plaintiffs are not entitled to limit their liability at all, because they have failed to show that the damage was solely caused by improper navigation. According to his contention it was caused by the joint operation of the *Alde* and the *Turbo*. I do not think it was the operation of the *Turbo* at all. The *Turbo* was used either as a winch or as a heaving post. It was also argued that persons on both the *Alde* and the *Turbo* were guilty of negligence. I do not think that matters. The question is, Was the navigation of the *Alde* improper? Mr. Dunlop's last contention was that

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even if the plaintiffs prove that the damage was caused solely by the navigation of the *Alde*, nevertheless, on the principle laid down in *The Ran ; The Graygarth* (1) and *The Harlow* (2), the limit of the plaintiffs' liability must be the tonnage of both the *Alde* and the *Turbo*. I think those cases are consistent and show that damage caused by a barge in tow due to the improper navigation of the tug and of the tow comes within the section, and that both vessels have to provide the amount of their joint tonnage. In those cases, however, there was improper navigation by the tug. It is suggested that the *Turbo* in this case was in a position similar to that of a tug. As I have pointed out, however, those cases are no authority for saying that the improper use of a capstan is improper navigation of a vessel on which the capstan is. It is the mere use of a machine for the purpose of navigating the other ship and not for navigating herself.

For these reasons I think the plaintiffs are entitled to the usual decree.

*Dunlop K.C.* Although the defendants have failed, the plaintiffs should pay the costs in accordance with the usual practice that the party seeking relief must pay the costs of the limitation proceedings : see *The Kathleen* (3) where, after a hearing lasting thirteen days, Lord Merrivale P. ordered the successful plaintiffs to pay the whole of the costs of the proceedings. The learned President said in that case : " It is impossible for me to say that the defendants were unreasonable in the course they took ; and I do not see my way to vary the general rule that the party seeking relief must pay the costs."

BATESON J. That case does not in any way fetter the discretion of the Court as to costs, and in this case I think the defendants, the owners of the *Ascania*, must pay the costs other than those ordinarily incident to a limitation suit.

(1) [1922] P. 80. (2) [1922] P. 175.
(3) (1925) 22 Ll. L. Rep. 80, 87.

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Solicitor for the plaintiffs: *J. D. Ritchie.*

Solicitors for the defendants, the owners of the *Ascania*: *Wm. A. Crump & Son.*

Solicitors for the defendants, the owners of the *Tom Tit*: *Keene, Marsland, Bryden & Besant.*

Solicitors for the defendants, W. G. Clarke & Sons (cargo owners): *Thain, Davidson & Co.*

E. C. M. T.

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ADMIRALTY.

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*June* 16; *July* 13, 14, 27.

## THE ST. GEORGE.

*Shipping—Bottomry—Advances by Managing Owner—Notice to Mortgagee—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 34.

The provision in s. 34 of the Merchant Shipping Act, 1894, that a mortgagor shall not be deemed to have ceased to be the owner of a mortgaged ship, except as far as may be necessary for making the ship available as a security for the mortgage debt, does not prevent the ship from being made the subject of a bottomry bond; nor is the consent of the mortgagee a pre-requisite of such a hypothecation; but, where practicable, the lender on bottomry should see that the mortgagee has notice of the necessity for the hypothecation before obtaining the bond.

Granting the necessity for the loan, the fact that the lender is registered as the managing owner, and is also a director of the company owning the ship, does not disable him from making advances on bottomry.

ACTIONS of bottomry tried together.

The plaintiffs, Major A. J. A. Douglas and William Alexander Grant, claimed judgment against the owners of the yacht *St. George* on two bottomry bonds for 2000*l.* and 1000*l.* respectively made by the master of the yacht at Balboa, Panama, and given to the respective plaintiffs as security for loans advanced by them. The owners of the *St. George*, a company called Research Expeditions, Ld., did not dispute the plaintiffs' claims, but the claims were opposed by an intervener, Ernest Everard Gates, the legal personal representative of a mortgagee, Ernest Henry Gates, who had a mortgage on the yacht for 25,000*l.* Judgment for the validity of this mortgage had been pronounced in a default action

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heard on March 8, 1926, and the yacht had been sold by order of the Court, and had realized 6600*l.*

The facts are fully set out in the judgment. Shortly stated, the case for the intervener was that the bottomry bonds were invalid on the following grounds: That no notice of the bonds had been given to the mortgagee; that the bonds were given after the money had been advanced, and not as consideration for the loans; that, in the case of Major Douglas, the bond was given to one who was, in fact, an owner of the vessel; and that the voyage was not an ordinary trading voyage, but a purely voluntary scientific expedition, and there was no necessity for its completion when funds were exhausted.

There was a counterclaim by the intervener against the plaintiff, Douglas, for 3000*l.* for alleged breach of duty as managing owner of the yacht in authorizing the giving of the bonds without first notifying the mortgagee.

*Balloch* for the plaintiffs. The defendants do not dispute the validity of the bonds and it is for the mortgagee to show that they are bad. Every reasonable presumption is made in favour of a bottomry bondholder: *The Karnak.* (1) As the advances were to enable the yacht to get away from a foreign port, it is immaterial that she intended to carry out her programme instead of returning home: *The Royal Arch.* (2) The expenses at Balboa for which the advances were required were necessaries: see *The Edmond.* (3) It is true, that some of the moneys advanced were for payment of insurance premiums, and insurance has been held not to be a necessary: *The Serafina* (4); *The André Théodore.* (5) But as the mortgagee was threatening to enforce his mortgage if the insurance premiums were not kept up, this fact made the payments necessary. The allotments to the seamen's dependents were also, it is submitted, necessary. As regards the portion of Major Douglas' advances which was expended

(1) (1868) L. R. 2 A. & E. 289, 299.
(2) (1857) Swa. 269, 277.
(3) (1860) Lush. 57, 211.
(4) (1864) Br. & L. 277.
(5) (1904) 10 Asp. M. L. C. 94.

by the defendant company in London, inasmuch as the plaintiff was not aware of it and the company had authorized the advance on bottomry, it is immaterial that the expenditure was not in fact on necessaries. The first loans made by the plaintiffs were not made on terms of bottomry, but a lender may resort to bottomry to secure his debt, although he did not contemplate doing so when the original advance was made. It is enough if he makes a further advance on the terms that he is to receive a bottomry bond to cover the total debt: *The Rubicon* (1); see also *The Trident* (2); *The Prince George* (3); and *The Ida.* (4)

It is immaterial that Major Douglas was a director of Research Expeditions, Ld., and was registered as managing owner of the yacht. He was merely an agent of the company, and a bottomry bond to an agent may be good: *The Hero* (5); *The Staffordshire.* (6) There is no magic in the phrase "managing owner": *Frazer & Co.* v. *Cuthbertson* (7); the validity of a bottomry bond is not affected even if an actual owner is on board: *The Duke of Bedford.* (8)

On the question of communicating with the mortgagee, the plaintiffs thought, and were entitled to think, that he knew the circumstances and had authorized the owners to give the bonds; in any event he could not have prevented the owners borrowing on bottomry. But in law there is no absolute obligation to communicate with a mortgagee: *The Staffordshire* (6); the lender is not put upon inquiry: *The Mary Ann* (9); see also *The Helgoland* (10) and *The Panama.* (11) As regards the counterclaim it is bad in substance and in form. The intervener is not in a position to counterclaim; Major Douglas was not the owner of the yacht, he owed no duty to the mortgagee and there was no privity of contract between them.

*Langton K.C.* and *John Bridge Aspinall* for the intervener. Both bonds are invalid, because they were given in prejudice

(1) (1833) 3 Hagg. Ad. 9.
(2) (1839) 1 W. Rob. 29, 34.
(3) (1842) 4 Moo. P. C. 21, 28.
(4) (1872) L. R. 3 A. & E. 542.
(5) (1817) 2 Dods. 139.
(6) (1872) L. R. 4 P. C. 194.
(7) (1880) 6 Q. B. D. 93, 98.
(8) (1829) 2 Hagg. Ad. 294.
(9) (1865) L. R. 1 A. & E. 13.
(10) (1859) Swa. 491.
(11) (1870) L. R. 3 P. C. 199.

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of the mortgagee's security. If there is a prior mortgage the ship cannot be the subject of bottomry unless the mortgagee consents. Under s. 34 of the Merchant Shipping Act, 1894, the mortgagor is still deemed to be the owner "except as far as may be necessary for making a mortgaged ship . . . . available as a security for the mortgage debt." If, therefore, an act of the mortgagor imperils the security of the mortgagee, as against the mortgagee that act is null and void: see the judgment of Lord Westbury in *Collins* v. *Lamport* (1), and also *Kitchen* v. *Irvine* (2) and *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade* (3) as to defeating the rights of a mortgagee. The observation of Fletcher Moulton L.J. in *The Manor* (4), that to allow a ship to become subject to a maritime lien might not be an infringement of the rights of the mortgagee, had reference to the ordinary risks which every ship runs—unless laid up—of incurring damage or salvage liens, and had no application to a deliberate attempt to create liens which have priority over the rights of the mortgagee. In the same judgment the Lord Justice pointed out that a ship ought not to be allowed to go a long voyage incurring ruinous liabilities having priority to the mortgage. If the mortgagor cannot prejudice the security of the mortgagee the master of the ship can be in no better position. Major Douglas' bona fides is not in question, but he in fact gave a bottomry bond to himself, although he was a director of the yacht owning company who, as mortgagors, are put on inquiry as regards the rights of the mortgagee. In *The Helgoland* (5) the mortgage was subsequent to the bond, and that case, therefore, is no authority for the suggestion that there need be no communication with the mortgagee. In any event the earlier loan of the plaintiff Grant was not the subject of a bottomry bond. He had never heard of such a bond as security for a loan; it was a mere personal debt which could not be converted into a bottomry transaction: *The*

(1) (1864) 34 L. J. (Ch.) 196, 200.
(2) (1858) 28 L. J. (Q. B.) 46.
(3) [1905] 1 K. B. 815.
(4) [1907] P. 339, 361.
(5) (1859) Swa. 491.

*Augusta*. (1) Similarly with regard to Major Douglas' advance, the first loan was not made on bottomry at all, and large portions of both loans were not for necessaries but for office expenses in London. Further, the voyage was really a pleasure cruise and not a commercial adventure, and, if so, even the sums expended on the so-called necessaries are not recoverable, as there was no "necessity" to prosecute the voyage.

[Reference was also made to *Dean* v. *M'Ghie*. (2)]

*Balloch* replied.

*Cur. adv. vult.*

July 27. THE PRESIDENT (LORD MERRIVALE) read the following judgment: These are actions brought by the respective plaintiffs to establish the validity of a bottomry bond for 2000*l*. in favour of the plaintiff Douglas, and a later bond for 1000*l*. in favour of the plaintiff Grant, made by the master of the yacht *St. George* in the port of Balboa in the Republic of Panama on November 14, 1924, by way of security, as is alleged by the plaintiffs, for moneys lent by them respectively upon terms of bottomry in order to enable the *St. George* to proceed from Balboa to Tahiti, in course of a voyage from London by way of Panama to various points in the Pacific. The defendants, the owners of the *St. George*, do not contest the plaintiffs' claim. They have under the circumstances of the case no interest in the litigation. Both claims are contested by an intervener, the legal personal representative of Ernest Everard Gates, now deceased. Mr. Gates was mortgagee of the *St. George* for an amount which is no doubt largely in excess of the realized value of the vessel. She has been sold under order of the Court, and has produced 6600*l*. The alleged loans of the plaintiffs are not admitted; the necessity of borrowing is denied. The bonds are impugned also on the ground that no notice of the several transactions was given by the lenders or the master of the *St. George* to the owners of the vessel. The mortgagee, it is further contended, was the owner, and

(1) (1813) 1 Dods. 283. (2) (1826) 4 Bing. 45.

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it is said that he had no notice, and that no bottomry bond which impaired his security could be given without his authority. For want of such authority the bonds are said to be invalid.

The intervener formulated a counterclaim whereby he demands to recover from the plaintiff Douglas, as damages, any sum or sums which may be found payable to the plaintiffs respectively in respect of the several bonds, on the ground of an alleged breach of duty of the plaintiff, Douglas, in the making of the bonds. Objection was taken at the hearing to the admissibility in this action of this personal claim in respect of this mortgage, but this matter need not be dealt with at length. The counterclaim was eventually not pressed. It is not founded upon facts or allegations of fact which appear to me to give the intervener a cause of action.

The litigation arises out of an ocean adventure uncommon in its character, mode of prosecution, and incidents. When these are known, it seems not to be out of keeping with other singularities of the enterprise that at a critical stage in the undertaking resort was had for its further prosecution to a mode of raising money out of common use at the present day and unfamiliar in current practice—borrowing on bottomry of the ship.

There was formed in London in 1923 " to promote scientific research by expeditions to various parts of the world " the " Scientific Expeditionary Research Association." The Association registered a private joint stock company with a capital of 3000*l.* for the purchase and fitting out of a ship for its expeditionary cruises. This ship was the *St. George*, a three-masted schooner with auxiliary engines. The first expeditionary cruise was planned for September, 1923. The itinerary from and to London included Teneriffe, the West Indies, Panama, Galapagos, Pitcairn, the Cook Islands, Tahiti, and the Marquesas, with a return voyage by Panama and the Azores ; 20,860 nautical miles and 304 days, of which 162 days were designed to be spent at sea and 136 on shore. For equipment expenses, subscriptions from scientists and loans on security were obtained. Toward the

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necessary costs of the expedition passage money at the rate of 700*l.* each was received from passengers. The number was not to exceed thirty, and in fact did not exceed six or seven. A contemplated further source of income of the company incidental to the cruise in question was the sale of cinema and publication rights, and among the staff of the expedition were various persons who were employed with a view to this possible means of profit. The passengers' contract note described the passage money as a contribution to the expenses of the expedition, and provided that "no action for damages shall lie against the owners by reason of cancellation or alienation of the proposed cruise," and said further: "It is understood that repayment of deposit"—i.e., 50 per cent. of the passage money—"will be made in full if the expedition fails to proceed on the voyage."

The objects of the company as stated in its memorandum of association included, besides the formation, management and control of expeditions to any part of the world for the purpose of scientific research, various commercial purposes, including the business of ship owners, the carriage of passengers, acquisition and sale of concessions or licences, photography, cinematography and taxidermy, and a multitude of other occupations capable of producing profit or loss.

The purchase of the *St. George* and setting out of the expedition cost, it is said, from 30,000*l* to 35,000*l*. Part of the outlay was advanced by a London bank on a guarantee. Mr. Gates, in whose right the intervener is acting, became guarantor, first of 20,000*l*. and then of a further 5000*l*., and to secure his liability to the bank he took from the company the mortgage of the *St. George* which is relied upon in the intervener's pleadings. He received also an agreement under which the company was bound, whether he should or should not become liable under the guarantee, to account to him for a percentage of any profits derived by the company from the sale of cinematographic plans, photographs or exhibitions.

The *St. George* set out upon her cruise in April, 1924, with supplies and funds which provided for her transit to Balboa. She arrived there in June, 1924. Three directors of the

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company were on board, one of them being the plaintiff, Douglas, who had also been registered under the Merchant Shipping Acts as managing owner of the ship. Her commander was an officer of naval experience, Captain David Blair. At Balboa the ship's available resources speedily became exhausted. The company's directors in London had been negotiating for further funds; they were in fact using all possible exertions in this behalf at all material times, before and until some months after the making of the bonds in question. As they informed their colleagues on the *St. George*, they had high expectations of success in this regard, but they wholly failed to secure funds. This failure led to applications locally at Balboa to various persons and ultimately to the several loans by the plaintiffs in respect of which, as is claimed, they took bottomry bonds. At the hearing of the cause every stage of the enterprise came under close examination on the various questions of necessity which arose, with the result of making it clear beyond reasonable doubt that it was only by means of moneys furnished by the plaintiffs to meet the extreme urgent difficulties of the company that the company's officers were enabled to proceed with the *St. George's* cruise in the Pacific.

The material facts as to the advances by the plaintiffs can be concisely stated. At all times from June to November the company had the *St. George* ready for departure to the Pacific as soon as they could raise the requisite funds. By arrangement between the directors in London and those on board short cruises from Balboa were planned and carried out; to Gorgoña, Corba, Galapagos, and again to Gorgoña. The first expedition to Gorgoña exhausted all the company's available resources. The directors on board and the master borrowed from the plaintiff Grant, 200*l.* to enable them to arrange the trip to Corba. Mr. Grant lent the money on the credit of the company's undertaking, without any knowledge of bottomry or any mention of security. In September the second Gorgoña cruise was planned. No funds were available for it or for any of the current expenses of the ship and her crew. On condition that the company would carry out the

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expedition to the Pacific Mr. Grant provided toward the ship's necessaries for this voyage 250*l.*, which sum was duly expended upon provisions, coal, canal dues, seamen's advances and other necessary outlay of the vessel. The advance on August 22 was described by cable from the ship to the board in London as "for present needs." The September advance was obtained by the master at the board's instance and reported by him as being made "on the understanding we should continue to Tahiti." When the *St. George* returned from her second Gorgoña expedition, at the end of October, 1924, the board in London instructed the master to obtain 3000*l.* on bottomry, and stated to the master that this had been "advised by Siggs." As to this instruction and alleged advice more must be said later. Until at any rate late in September, 1924, the subject of bottomry was unknown to both the plaintiffs. Cable messages from the board in London in October and November, 1924, led to the obtaining of information by the plaintiffs with regard to bottomry, and prepared the way for an arrangement which was entered into about November 5, 1924, whereby Mr. Douglas agreed to advance 2000*l.* on bottomry and Mr. Grant a further 500*l.*, to enable the *St. George* to proceed to Tahiti. In response to continued urgent representations by the board in London of the desperate financial plight of the company and its inability to provide for overdue premiums upon the insurance of the vessel and allotments payable to dependents of the crew, Major Douglas also arranged an advance to the company in London by his bankers of a further 1000*l.*, which the directors applied to the amount of 700*l.* for these pressing needs. With the balance they met various small current expenses.

The advance of 1000*l.* at Balboa agreed for by Major Douglas in November, 1924, was put to the ship's credit at Balboa on November 10. He made the advance on the promise that it should be secured by bottomry. Mr. Grant's loans in November were put to the ship's credit in Balboa: 500*l.* on November 5, 50*l.* on November 13. The respective bonds were executed by the master on November 14. Major Douglas's advance of 1000*l.* to the company in London became

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effective on November 12. The inclusion in the security of his two advances of 1000*l.* each was made in accordance with an arrangement he made with the master of the *St. George.* Mr. Grant lent the 500*l.* which he provided on November 5 and the 50*l.* which he provided on November 13 after a statement had been made to him that if he made them he would be given a bottomry bond for 1000*l.* to cover the sum total of his loans at Balboa.

The sums of 1000*l.* and 550*l.* which were paid into the bank at Balboa by Major Douglas and Mr. Grant in November, 1924, were disbursed by the master. Cash payments were made for provisioning and coaling the ship, advances to the men, canal dues, and daily outgoings; 113*l.* 5*s.* 2*d.* was appropriated to discharge an advance the master had made shortly before out of his own moneys to provide coals. The balance was left in the bank at Balboa and appears to have been applied to complete the payment of the expenses incurred in order to enable the *St. George* to quit Balboa and proceed to Tahiti.

Before examining the various objections which are made to these bonds it will be useful to state shortly my understanding of the law which governs the case. The root of the matter seems to be that the power to effect bottomry arises when there is necessity, and not otherwise. Lord Stowell cites and adopts in his judgment in *The Gratitudine* (1) a passage in which Bynkershoek sums up the principle of ancient maritime usage whereby a ship's master on his voyage had been from remote times empowered to deal with emergencies by hypothecating the ship "magistro peregre agenti permissum est, navem ex causa necessitatis obligare." Speaking at a time when necessity at sea arose in modes which are not common under the changed conditions of to-day, Lord Stowell also said this: "the law of cases of necessity is not likely to be furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is reasonable and just in such cases is likewise legal." The subject under consideration there was the extent to which the power to bottomry

(1) (1801) 3 C. Rob. 240, 266, 267.

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a ship's cargo is dependent upon previous communication of this need to the owners. Necessity in two particulars must be proved by a lender who claims upon bottomry. The first essential is to show the ship's need for the expenditure in order to prosecute the voyage from the foreign port: *The Royal Arch* (1); *The Karnak*. (2) The next is to show that this necessity could only be met by hypothecating the ship: see also *The Hersey* (3) and Abbott's Merchant Shipping, 14th ed., p. 205.

To whatever extent the validity of a bottomry bond depends upon notice of the intended transactions to be given to a person whose rights it will postpone or impair, the condition which requires such notice seems to me to spring from the general principle that the power to effect bottomry depends upon necessity. As to owners, it was said in *Australasian Steam Navigation Co.* v. *Morse* (4) that "where there is a reasonable expectation" that effective communication can be made, the master must endeavour to obtain the owners' instructions. As to owners of cargo, the judgment in *The Bonaparte* (5) laid down the rule that before making bottomry of cargo the master should communicate with such owners. "In general it is his duty to do so, or it is his duty in general to attempt to do so." The existence of this obligation had not always been recognized. When difficulties of communication and other causes of sudden and urgent necessity at sea led to insistence on the "high and privileged nature" (*The Alexander* (6)) of bottomry transactions, notice to mortgagees as a condition of bottomry of the ship appears not to have been invariably treated as essential. Textwriters have cited Dr. Lushington's observation in *The Helgoland* (7) that a lender on bottomry is under no obligation to communicate with the mortgagee of the ship, without due regard to the fact that the mortgage there under consideration was granted subsequently to the bottomry bond.

(1) Swa. 269, 277, 278.
(2) L. R. 2 A. & E. 289; 2 P. C. 505.
(3) (1837) 3 Hagg. Ad. 404, 408.
(4) (1872) L. R. 4 P. C. 222, 232.
(5) (1853) 8 Moo. P. C. 459, 473.
(6) (1812) 1 Dods. 278.
(7) Swa. 491, 498, 499.

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In various reported cases, however, loans on bottomry have taken precedence of moneys due on previous mortgages: see *The Duke of Bedford.* (1) In *Smith* v. *Bank of New South Wales* (*The Staffordshire*) (2) the subject of notice to mortgagees is discussed, and notice is not treated as immaterial, but the absence of notice under the circumstances of the case was held to be immaterial by reason of the fact that "there was really no opportunity." Having regard to the principle which seems to me to underlie the authorities, I have considered that I ought to examine this case upon the footing that, as is said with regard to this matter by the learned editors of Abbott's Merchant Shipping, 14th ed., p. 206, "If a lender should happen to know that the mortgagees are more interested than anybody else in getting the ship home, he will do well to see that they have notice of the necessity for hypothecation if communication is practicable." "What is necessary" and "what is reasonable and just" were, as I have before mentioned, conditions of validity of bottomry bonds which Lord Stowell laid down in *The Gratitudine.* (3)

In the light of the authorities there was, in my opinion, necessity at Balboa that those in charge of the *St. George* should raise money there if the ship was to continue her voyage. It was said at the hearing that the undertaking of the company in this cruise was not of a commercial nature. I have indicated particulars in which it had that character. The documents show that the company had money-making aims in respect of possible sales and exhibitions of pictures and films, and carriage of passengers at substantial rates of charge. It is not clear either, that if this cruise had been abandoned at Balboa the passengers would have had no claim to repayment of passage money. Further, the ship lay in a foreign port, subject as I suppose to arrest and sale for all kinds of liabilities which were daily accumulating. There was necessity to take her on or bring her home. There was necessity at Balboa also, if money was to be obtained, to

(1) 2 Hagg. Ad. 294. (2) L. R. 4 P. C. 194.
(3) 3 C. Rob. 240.

obtain it by hypothecating the ship—i.e., by bottomry. Every contemporary opinion of informed persons capable of advising seems to have been to that effect. The mortgagee's solicitors were of that mind; indeed, the suggestion of recourse to bottomry appears to have originated with them.

In the case of the plaintiff Douglas, objections were made that he could not lend on bottomry of the *St. George* because he was a director of the company and "managing owner." As director he was the owners' agent; his statutory position as managing owner did not in any sense vest the ship in him in point of property either at law or in equity. When it was said long since that an agent's advances on bottomry will be very carefully scrutinized, the reference was I think to a ship's agent one of whose functions was to grant or obtain credit for the ship. I see no ground on which it can be said that Major Douglas was disabled from making such advances. I must hold him to have been in the circumstances a capable lender on bottomry of the ship.

The question as to notice to the mortgagee, Mr. Gates, is by no means easy of solution. It is complicated by the fact that the company's legal adviser, Mr. Siggs, of Robert Greening & Co., was at all times the legal adviser of the mortgagee. He was also the mortgagee's friend and brother-in-law. The plaintiff Douglas knew of the mortgage and had good reason for believing, as he did, that the mortgagee approved of his making a loan to the company on a bond which would take precedence of the mortgage debt. There is no precise proof that the plaintiff Grant knew of the mortgage, but the course of events leads me to suppose it had been mentioned to him, and that he shared generally the belief on this subject of the plaintiff Douglas. The company's directors on board the *St. George*, and the master, supposed, and had good reason to suppose, that the mortgagee knew of an intended borrowing on bottomry, and assented to it. So far as the board in London are concerned they had reason for supposing—and I think they did suppose—that the mortgagee was being kept informed by his solicitor and relative, Mr. Siggs. The mortgagee had in August written

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to one of their secretarial staff that he left them to Mr. Siggs. I accept the evidence of Mr. Siggs that Mr. Gates did not in fact know of the making of the bonds in question before, or within some weeks after, the same were made. Mr. Siggs had means of knowledge which I think he avoided using because he apprehended that knowledge might be inconvenient. The decisive question is not whether notice of the making of the bonds reached the mortgagee. Reasonable means were taken to satisfy him of what was being done through his authorized agent, and there was reasonable ground for the belief the plaintiff Douglas had—and I think the plaintiff Grant had—that the mortgagee consented to the hypothecation.

The questions with which I have dealt arise upon the supposition that the case is one in which bottomry was possible. It was contended, however, on the intervener's behalf, that any bottomry of the *St. George* was impossible, because of the existence of the mortgage. This proposition depends upon the construction of the terms of s. 34 of the Merchant Shipping Act, 1894, which reproduces s. 70 of the Merchant Shipping Act, 1854. The section is in these words : " Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof." The exception in the statute was said to exclude from the powers of a mortgagor in possession any dealing which makes the ship unavailable for the mortgagee's security. The argument was based upon cases like *Collins* v. *Lamport* (1), *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade* (2), and *The Manor* (3), where the Courts were invited to, and sometimes did, interfere, at the instance of mortgagees of ships, to protect mortgage securities which were imperilled by dealings of mortgagors in possession. More particularly the argument depended upon a passage in the judgment of Lord

(1) 34 L. J. (Ch.) 196, 200. (2) [1905] 1 K. B. 815.
(3) [1907] P. 339, 361.

Westbury L.C. in *Collins* v. *Lamport* (1): "As long . . . . as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice and detract from, or impair the sufficiency of the security of the vessel, as comprised in the mortgage, so long is there parliamentary authority given to the mortgagor to act in all respects as owner of the vessel." These words were insisted upon in their tenor and implication as though they constituted an enactment of the Legislature—which, of course, they do not. The judgment in *Collins* v. *Lamport* (1) does not, and so far as I know there is no judgment which does, determine that a mortgaged ship cannot be bottomried, or that consent of the mortgagee is a pre-requisite of such a hypothecation. Generally the cases appear to me to proceed upon the hypothesis that, but for the intervention of the Court, acts of the mortgagor might be effective in prejudice of the rights of the mortgagee. Fletcher Moulton L.J., in his judgment in *The Manor* (2), says this: "It may well be that to allow a ship to become subject to a maritime lien may not be an infringement of the rights of the mortgagee, even though that maritime lien ranks above claims under the mortgage." By what means precisely, and at what point, the powers of a mortgagor in possession are intended to be confined or curtailed by the words of the statute I need not here attempt to determine. It appears to me incredible that the Legislature, either in 1854 or in 1894, intended by the words relied on for the interveners, to extinguish the powers of a ship's master (*a*) to bottomry a distressed ship in case of need, or (*b*) to subject a damaged ship to a possessory lien in order that she might be repaired. The language used is not apt for the purpose if it was meant to deprive masters of ships of powers which they notoriously had. Acts in the exercise of those powers seem to me not to be dealings by the mortgagor. Nor is it obvious that they impair, or are calculated to impair, the security of the mortgagee. They are perhaps rather calculated to preserve it. In the well-known judgment of Lord

(1) 34 L. J. (Ch.) 160, 200. (2) [1907] P. 339, 361.

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Gorell—then Barnes J.—in *The Ripon City* (1), a passage is found which militates against the argument of the intervener on this subject. The learned judge enumerates the classes of claims which give maritime liens—"bottomry, salvage, wages"—and others—and discusses, with s. 34 of the Act of 1894 before him, the grounds on which such claims take precedence of the rights of mortgagees, stating as the cause of such precedence that: "The vessel is permitted by a party interested in her to be in another's possession and employed so as to become subject to maritime liens." On the construction of the section, and in my view of the law applicable to the case, it is impossible I should give effect to the contention of the intervener under the Merchant Shipping Act, 1894, s. 34.

An alternative proposition, which was glanced at in course of the argument upon s. 34, was that the Court on examination of the particular transaction—as, for example, this—might hold it to be avoided by the statute as being, in fact, a dealing of the kind defined by the section. The relevant issue of fact was not specifically formulated in this case, and upon the materials before me, I am by no means convinced that the resort of the master of the *St. George* to bottomry at Balboa was a dealing which made the ship unavailable for the mortgagee's security. All the proprietary interests concerned were being prejudiced by the situation from which the ship was removed.

In the view I take of the dealings of the plaintiffs with the *St. George*, there remains only the question whether the moneys they respectively lent were lent for and applied to the necessities of the ship for the continuance of her voyage. As to Major Douglas, 1000*l.* of the sum for which he claims to have security was lent in London, and applied in London to various purposes of the company. The 600*l.* paid for insurance was not a necessity of the voyage to the Pacific. Allotments to seamen's dependents did not secure the continuance of the cruise. No part of this expenditure in London seems to me to be properly chargeable on the ship by the

(1) [1897] P. 226, 244.

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bond in question. The total amount of the alleged disbursements in Balboa, and of the moneys provided by the plaintiffs, appears to have been about 1424*l.* Of this Mr. Grant provided 550*l.*, which is expressly identified as having been expended upon necessaries for the impending voyage. A sum of 113*l.* was paid to the master, as I have said, in repayment of sums he had advanced to the company, as appears by his affidavit, but I do not find it proved that the plaintiff made his loan with a view to this payment. Deducting the amounts I have specified, 761*l.* remains which could be, and I think was, disbursed for the continuance of the voyage. This is the full amount in which, so far as present proof goes, the vessel can be deemed to stand charged by bottomry in favour of Major Douglas.

The difficulty with regard to Mr. Grant is that his advances in August and September, though they were applied for necessary purposes of the ship, were not lent on bottomry. I accept his evidence that the master told him afterwards that these sums should be included in his bond. I am not sure, however, that he stipulated for such inclusion, or made his further advances conditional thereon. On the whole I come to the conclusion that the bond of the plaintiff Grant ought to be held a valid security for the advances of 550*l.*, and not as to the earlier loans. There is jurisdiction in the Court to direct an inquiry by the registrar and merchants as to the amounts due to the respective plaintiffs. In Mr. Grant's case I think there is no reason for such an inquiry. Should either party desire a further investigation of the accounts on which I have arrived at my provisional figure of 761*l.* in the case of Major Douglas I shall duly consider any application in that behalf which it may be thought fit to make.

Solicitors for the respective plaintiffs: *Crawley Arnold & Co.; Croft & Russell.*

Solicitors for the intervener: *Savory, Pryor & Blagden, for Wade, Tetley, Wade & Co., Bradford.*

E. C. M. T.

END OF VOL. AND OF PROBATE SERIES FOR 1926.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1926, will be as follows :—

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